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## Symposium Article

### Transitional Post-Occupation Obligations under the Law of Belligerent Occupation

Dana Wolf\*

#### Abstract

*Today's armed conflicts present far more varied and complex circumstances of occupation, extending beyond the traditional model of interstate war on which the law of belligerent occupation was originally based. As a result, confusion abounds regarding when the duties and obligations of an occupier are triggered, while scholarly debate revolves around the meaning of the law of belligerent occupation and its alleged inadequacies in the transition from occupied to post-occupied territory. The unfortunate consequence is that civilian populations often face serious humanitarian risk at the conclusion of a belligerent occupation.*

*Various proposals attempt to remedy this gap by addressing whether international law imposes continuing duties upon a former occupier with respect to a previously occupied territory and the civilian population. Focusing on the law of belligerent occupation, this article argues that, as a legal matter, the law of belligerent occupation does not create an ongoing regime of post-*

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*occupation duties for the former occupier. However, the law of belligerent occupation offers possibilities to address the problem of civilian protection through an expanded understanding of coordinated transition from the former occupier to the returning sovereign. To fill the legal vacuum, this article proposes that some form of limited transitional post-occupation obligations should be triggered under certain circumstances when the end of occupation is approaching and identifiable gaps exist in essential governance and civilian protection.*

## I. INTRODUCTION

The unfortunate consequence of contemporary conflicts is the serious humanitarian risk that civilian populations often face at the conclusion of a belligerent occupation. Due to open legal questions and gaps in the law, there is no consensus regarding which obligations concerning governance, security, and public order are assigned to parties in a conflict. Calls in the international community to fill at least some of these gaps through legal rubrics, such as post-occupation duties, irrespective of the body of law from which they originate, aim to address the practical, undeniable needs of affected civilian populations.<sup>1</sup>

This issue of civilian protection in post-occupation situations became a focus of discussion among international law scholars in reaction to two events: the Security Council Resolution to end the occupation by the Coalition forces in Iraq in 2004 and the case of Gaza after Israel's unilateral withdrawal in 2005.<sup>2</sup> In the latter instance, multiple legal issues arose with

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1. A complete answer to the international law question of post-occupation duties would have to take into account several major bodies of international law, including the law of belligerent occupation, (international humanitarian law), international human rights law, the law of state responsibility, and others. This article confines itself to an examination of the question solely under the law of belligerent occupation. It sets aside other bodies of international law for another day, save for brief asides to suggest possible directions for synthesizing a full legal analysis.

2. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 9–10, 254–55 (2d ed. 2012). In 2004, the U.N. Security Council recognized the end of the United States-led occupation of Iraq, despite the fact that military troops remained in Iraq until 2011, retaining a substantive level of control over the territory. S.C. Res. 1546 (June 8, 2004) (“Welcoming the beginning of a new phase in Iraq’s transition to a democratically elected government, and looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq

regard to the application of the law of belligerent occupation, based on the Israeli High Court of Justice (HCJ) decision in the *Al-Bassiouni* case (2008).<sup>3</sup> It is significant that these are the only two cases where the law of belligerent occupation was invoked and adhered to by an occupying state.<sup>4</sup>

Civilian protection became primary because today's armed conflicts present far more varied and complex circumstances of occupation, extending beyond the traditional model of interstate war on which the law of belligerent occupation was originally based. According to the traditional interstate war paradigm, occupation is a temporary incident of conflict that begins with a hostile army invading a territory, establishing its forces there and exercising effective control over the territory and its population.<sup>5</sup>

As follows, reversal of these elements signifies the end of occupation. In some cases, this event might be conterminous with the end of the conflict, wherein a negotiated peace

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by 30 June 2004.”). The presence of United States-led forces after the end of occupation was ratified by an agreement with the local temporary government. BENVENISTI, *supra*, at 254–55.

3. HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister. ¶¶ 12–15 (2008) (Isr.) (unpublished), [http://elyon1.court.gov.il/files\\_eng/07/320/091320.n25.htm](http://elyon1.court.gov.il/files_eng/07/320/091320.n25.htm). In 2008, following ongoing acts of hostility by Hamas against Israeli citizens and Israel's decision to impose further restrictions upon the Hamas regime including fuel and electricity reductions, a petition was filed to the Israeli HCJ against the government's decision. The HCJ confronted the question of whether the various restrictions upon the supply of fuel and electricity to Gaza harmed the essential humanitarian needs of the local residents. The court stated: “We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applies in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exist between it and the Hamas organization that controls the Gaza Strip; these obligations also derive from the degree of control exercised by the State of Israel over the border crossing between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.” *Id.*

4. BENVENISTI, *supra* note 2, at 203, 249.

5. *Id.*

agreement includes a reversion of the rights and duties of governance from the occupier back to the sovereign. In other cases, however, this event may be merely a withdrawal of occupation under the adversary's military pressure as the greater conflict continues. Whether the conflict continues or ends with the occupation, the law of belligerent occupation is best understood to mean that the former occupier is no longer subject to the legal duties of occupation (except for the legal requirements to remedy wrongs done during the occupation).

Due to the changed circumstances of many occupations today, confusion abounds as to when the duties and obligations of an occupier are triggered. Contemporary conflicts range across a wide variety of contexts, rendering many shades of gray rather than a simple on-off switch for determining when an occupation is underway. When no such bright line for occupation exists, there is also no clear trigger to signal when the responsibilities of the occupier for governance of the occupied territory and its population begin and end. These contemporary situations can include any of the following: refusal by a state to even acknowledge that its military forces are occupying territory, or recognize that it has the duties of an occupier according to the law of belligerent occupation; questions of whether occupation law applies to contemporary, legally novel situations of humanitarian intervention where armed conflict is undertaken for the protection of the population of the "occupied" territory from its own government; situations in which the armed forces of the occupying state only gradually withdraw or unilaterally withdrawal, leaving open legal questions as to whether or when the occupation—and, presumably, the duties of the occupier—come to an end and over what timeframe; situations in which the legal status of foreign armed forces changes through agreement with the new government of the legitimate sovereign or by a binding determination of the United Nations Security Council.<sup>6</sup>

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6. See S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (recognizing the end of the U.S.-led occupation in Iraq, despite the fact that United States military troops remained in the territory and retained a substantive level of control over the territory, ratified by an agreement with the temporary government); Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 LOY. L.A. INT'L & COMP. L. REV. 57, 65 (2009) (highlighting factors that incentivize occupying forces to deny obligations); Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT'L REV. RED CROSS 133, 157 (2012) (determining the end of occupation through progressive phasing out or sudden

The debate within the international community revolves around the meaning of the law of belligerent occupation and what some would argue are its inadequacies in this context. A common critique tackles the binary legal conditions in the existing law, which erroneously assumes the facts will always render an easy judgment to determine if occupation law is occurring or not.

As mentioned, today's conflicts and occupations rarely have a clear, negotiated ending; the various stages are now marked by de facto processes rather than formal, legal ones. These can include, for example, a longer process of transferring authority and the absence of a peace agreement or any negotiated process, often resulting in a vacuum of governance authority. Under such circumstances, if an occupier's duties end when the occupation ends, the possibility remains that, for a period and perhaps permanently, *no* party takes on the rights and duties of the sovereign for providing governance, order, and provision of essential public services to the affected population.

Various proposals have been offered and discussed by scholars to remedy this gap by addressing the question of whether international law imposes continuing duties upon a former occupier with respect to a formerly occupied territory and its civilian population. Many of them draw upon bodies of law such as human rights law and the law of state responsibility, which are beyond the scope of this article.<sup>7</sup> Instead, this Article

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withdrawal).

7. See *id.* at 89; Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation* (Tel Aviv Univ. Law Sch., Working Paper No. 93, 2008), <http://ssrn.com/abstract=1254523> [hereinafter, Benvenisti, *Unilateral Termination*]; Eric De Brabandere, *The Concept of Jus Post Bellum in International Law*, in JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 123, 123–41 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014); Yael Ronen, *Post-Occupation Law*, in JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 428, 428–46 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014); Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel*, 42 ISR. L. REV. 101, 114–15 (2009) [hereinafter Shany, *Bassiouni*]; Yuval Shany, *Faraway So Close: The Legal Status of Gaza after Israel's Disengagement*, 8 Y.B. INT'L HUM. L. 369, 369–83 (2005) [hereinafter Shany, *Faraway*]; Ralph Wilde, *Are Human Rights Norms Part of the Jus Post Bellum, and Should They Be?*, in JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE 163, 163–86 (Carsten Stahn & Jann K. Kleffner eds., 2008); Boon, *supra* note 6, at 76–77.

I would just briefly emphasize that it is more or less accepted among the scholars cited here that post-occupation obligations cannot be governed primarily by human rights law, and its application should not serve as a reason to displace the clear and established normative framework of the law of

focuses on the law of belligerent occupation. It argues that as a legal matter, the law of belligerent occupation does not create an ongoing regime of post-occupation duties of the former occupier because it is concerned not only with civilian protection, but also with ensuring that occupation should be a temporary condition and not a mechanism for creeping annexation.

It seems, however, that the law of belligerent occupation does offer certain possibilities for addressing the problem of civilian protection through an expanded understanding of its existing terms on coordinated transitions from the former occupier to the returning sovereign. To fill the legal vacuum, this Article proposes that some form of limited transitional post-occupation obligations should be triggered under certain circumstances such as, among others, when it is known that an end of occupation is approaching that entails a complex process or requires a longer time period. Another trigger would occur when the end of occupation is not concluded by a peace agreement and where the specific circumstances indicate that the local governing authority would not be fully restored with the end of occupation. Thus, when the end of occupation is approaching, and gaps appear in essential governance issues, transitional post-occupation obligations should be limited in time and scope and reached by negotiation and/or coordination between the local government and the former occupying power.

Section II of this paper analyzes the law of belligerent occupation and its legal framework to underscore the inadequacies of the law in contemporary conflicts. Section III explores certain weaknesses of the doctrinal, traditional paradigm of the law of belligerent occupation, particularly with respect to the end of occupation as it occurs in contemporary situations, which can, in some cases, leave the territory at risk of a vacuum in governance. Section IV illustrates that as a legal matter, the law of belligerent occupation does not create an ongoing regime of post-occupation duties of the former occupier. To fill this gap, Section V aims to set a structure for the evolution of international law in order to adapt the existing law of

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occupation. The law of state responsibility, as a secondary norm, might apply only during the occupation and transitional period as long as effective control exists but not in its aftermath. The remedy of compensation for wrong-doing in the past would be meaningless at the aftermath stage when the population lacks basic infrastructure and public institutions. Ongoing provision of essential governmental services is more relevant for the local population after the end of occupation.

belligerent occupation to today's heterogeneous situations of conflict and occupation. I consider the features of a slightly more expansive reading of the law of belligerent occupation's existing transitional measures, one that might capture most contemporary gaps by treating the post-occupation duties of civilian protection as a "package" of the rights and duties of governance to be transferred from departing occupier to returning sovereign.

## II. THE END OF MILITARY OCCUPATION AND ITS CONSEQUENCES

The legal questions of post-occupation duties arise in part from the answers to vital preceding questions: What constitutes the end of occupation in a legal sense and what are its legal consequences? In other words, can a former occupier continue, at least in part, to exercise an occupier's duties through the effects of its acts, or its failures to act, even after it physically departs the occupied territory? And who bears responsibility for governance of a territory, or the failure to govern, at least in terms of minimum security, public order, and services, following the end of occupation? The legal question of what constitutes the end of occupation thus has large and practical implications with respect to the three basic actors in occupation law: the occupier, the legitimate sovereign, and the local population affected by occupation.<sup>8</sup>

Although the abstract meaning of the term "end of occupation" might be obvious, the criteria for determining its existence, and hence the applicability of the substantive rules of occupation, are less than perfectly clear.<sup>9</sup> The law of belligerent occupation does not provide a roadmap for terminating a military occupation. It offers neither a definition of the end of occupation nor a criterion for when it has been reached. In the absence of a precise definition for the *termination* of military occupation, a definition of the *commencement* of military occupation, as outlined in Article 42 of the 1907 Hague

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8. See generally Eyal Benvenisti, *Occupation and Territorial Administration*, 1–3 (Glob. Tr., Working Paper No. 11/2015, 2015) (explaining the law of occupation and the evolution of the concept of occupation).

9. Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 249 (1984); see, e.g., U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 139 (July 18, 1956) [hereinafter Army Field Manual 27-10].



Regulations, offers a starting point for this inquiry.<sup>10</sup>

#### A. THE BEGINNING OF MILITARY OCCUPATION

Article 42 of the 1907 Hague Regulations states that a “[t]erritory is considered occupied under international law when it is actually placed under the authority of the hostile army.<sup>11</sup> “The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>12</sup> Article 42 determines that two conditions must be fulfilled for occupation to begin: (1) hostile troops must be physically located in the area so that the legitimate government is incapable of exercising effective powers of government; and (2) military troops must be capable of exercising effective powers of government over the occupied territory.<sup>13</sup> The question of whether there is a formal recognition of occupation is merely a factual test that will be assessed on a case-by-case basis.<sup>14</sup> According to Article 42, occupation relies on an *objective* determination based on the actual submission of territory to the authority of hostile foreign armed forces and not on a subjective perception of the prevailing situation by the parties.<sup>15</sup>

The first condition of Article 42 to constitute occupation is a preliminary condition for the second—i.e., the physical presence of troops *must* exist before effective governmental control can be

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10. Hague Convention IV Respecting the Laws and Customs of War on Land, arts. 42–43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Regulations]; see BENVENISTI, *supra* note 2, at 56 (“The conditions that define when occupation begins also identify when it ends.”); Benvenisti, *Unilateral Termination*, *supra* note 7.

11. 1907 Hague Regulations, *supra* note 10, art. 42.

12. *Id.*

13. *Id.*; see also GERHARD VON GLHAN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 28 (1957).

14. See DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 274 (2d ed. 2008); see also Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 166, ¶ 173 (Dec. 19); Trial of Wilhelm List and Others, Case No. 47, U.S. Military Tribunal, Nuremberg, 8 LAW REP. TRIALS WAR CRIMS. 34, 55–56 (1948) [hereinafter Hostage Trial]; Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT’L COMP. L. Q. 27, 28 (2005); Nicholas Rostow, *Gaza, Iraq, Lebanon: Three Occupations Under International Law*, 37 ISR. Y.B. ON HUM. RTS. 205, 217–19 (2007).

15. Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT’L REV. RED CROSS 133, 135 (2012).

achieved.<sup>16</sup>

As follows, the second occupation condition of Article 42 is an examination of whether the occupying state has exercised authority over the territory. The text is ambiguous, however, and conflates the actual exercise of authority (“actually placed

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16. Marten Zwanenburg, *The Law of Occupation Revisited: The Beginning of an Occupation*, 10 Y.B INT'L HUM. L. 99, 110 (2007). In 1863, The Lieber Code was issued to the Union Forces during the American Civil War. See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1898). Although the Lieber Code did not contain an explicit definition of “occupation,” it was the first legal instrument to imply that “occupation” meant actual physical presence of military troops on a foreign territory. *Id.* Physical military presence was also a condition for constituting occupation as part of later attempts to codify the laws of war by the 1874 Brussels Declaration. Final Protocol of the Brussels Conference on the Rules of Military Warfare, art. 1, Aug. 27, 1874, 148 C.T.S. 133. It then included the same definition for occupation as it appears in the 1907 Hague regulations. Compare *id.*, with 1907 Hague Regulations, *supra* note 10, art. 42. Although the 1874 Brussels Declaration never entered into force as treaty law, it had an important influence on later treaties that were adopted. After parties failed to adopt the 1874 Brussels Declaration, the Institute of International Law adopted the Oxford Manual on the Laws of Wars on Land. OXFORD MANUAL ON THE LAWS OF WAR ON LAND (1880), reprinted in RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 26 (James Brown Scott ed., 1916) [hereinafter OXFORD MANUAL]. The 1880 Oxford Manual was a high-quality code that for the first time aimed to specify the law of war and included an explicit definition of the term “occupation.” *Id.* The manual contained three express requirements for the legal existence of occupation (Article 41): (1) occupation follows the invasion of hostile forces; (2) the state to which the territory belongs has ceased to exercise its ordinary authority as a result of the invasion; and (3) solely the invading state is in a position to maintain order over the occupied territory. *Id.* These three conditions clarified matters considerably. Yet, the 1880 Oxford Manual’s Article 41 was not clear on whether actual physical military presence was required to constitute a legal state of occupation. *Id.* The Institute of International Law encouraged European Governments to adopt the 1880 Oxford Manual. *Id.*; see also Yutaka Arai-Takahashi, *Preoccupied with Occupation: Critical Examination of the Historical Development of the Law of Occupation*, 94 INT’L REV. RED CROSS 51, 60, 64 (2012); VON GLHAN, *supra* note 13, at 9. The international legal community, however, continued to debate whether the physical presence of troops was necessary to trigger the law of occupation. Years later, in an attempt to revise the 1874 Brussels Declaration, that document’s original definition of military occupation formed the basis of discussion in The Hague International Conference. Hague Convention II Respecting the Laws and Customs of War on Land, art. 43, July 29, 1899, 32 Stat. 1803, 1808, 1 Bevans 247, 251 [hereinafter 1899 Hague Convention]; DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914: A HISTORICAL SURVEY 30 (1949). The Second Hague Peace Conference of 1907 adopted, as is, the wording of 1899 Hague Convention that defined occupation. Its wording is similar to the original principles expressed in 1874 Brussels Declaration, emphasizing that physical military presence is an essential element for the beginning of occupation. See 1907 Hague Regulations, *supra* note 10, art. 42.

under the authority;" "such authority has been established") with the potential exercise of such authority ("can be exercised").<sup>17</sup> Although vaguely worded, Article 42 clearly forbids fictitious occupations and states that the element of control determines whether the law of occupation applies.<sup>18</sup>

The controversy surrounding the requisite level of effective control thus centers on two main approaches: (1) the *potential* nature of foreign military troops' presence in the occupied territory; and (2) *actual* control. According to the first approach, which is more accepted, occupation requires both actual military presence and potential powers of government over the occupied territory.<sup>19</sup> The second approach is more restrictive and requires not only the potential for an occupying state to control the territory, but also its actual exercise of such control. In this view,

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17. Marten Zwanenburg, Michael Bothe & Marco Sassoli, *Is the Law of Occupation Applicable to the Invasion Phase?*, 94 INT'L REV. RED CROSS 29, 31 (2012).

18. See 1907 Hague Regulations, *supra* note 10, art. 42. Possession and administration are the two essential facts that constitute an effective occupation. LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. 1 PEACE 557-559 (1955). Possession means that the territory must really be taken under "its sway (corpus) with the intention of acquiring sovereignty over it (animus)." *Id.* After taking possession, the possessor must establish some kind of administration thereon that shows that the territory is really governed by the new possessor. *Id.* Since an occupation is established only if effective, it is obvious that the extent of an occupation ought to cover only so much territory as is effectively occupied. See Hostage Trial, *supra* note 13, at 56; see also MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 219 (1959); Ferraro, *supra* note 15, at 139-40; VON GLHAN, *supra* note 13, at 28-29.

19. The International Criminal Tribunal for the former Yugoslavia (ICTY) adopted the first approach and has provided some guidelines for determining when occupation is taking place: (1) the occupying power must be in a position to substitute its own authority for that of the authorities; (2) the enemy's forces must have surrendered, been defeated or withdrawn; (3) sufficient forces of the occupying state are present in the territory or can be sent within a reasonable time to establish authority; (4) a temporary administration has been established over the territory; and (5) the occupying power has issued and enforced directions to the local population. HCJ 102/82 Tsemel et. al. v. Minister of Defence 37 (3) P.D. 365 (1983) (Isr.) (stating that the Israeli HCJ also adopted the first approach of potential control of effective control required to constitute occupation); Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶ 217 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003); U.K. MIN. OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT 273-307 (2004); CAN. OFF. OF JUDGE ADV. GEN., JOINT DOCTRINE MANUAL: LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVEL §§ 1202-03 (2001); COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 179 (Jean S. Pictet ed., 1958) [hereinafter PICTET COMMENTARY GC IV], [http://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf); Hostage Trial, *supra* note 14, at 55-56; Army Field Man. 27-10, *supra* note 9, at 139.

occupation begins only when the occupying power is actually exercising its authority over the territory.<sup>20</sup>

When evaluating the beginning of occupation, determining whether the territory is in a situation of occupation or mere invasion is crucial.<sup>21</sup> A distinction must also be made between a situation of occupation and a blockade or military pressure.<sup>22</sup> As discussed, contemporary conflicts have added an additional layer of complexity. The most meaningful development in the

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20. GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, VOL. 2: THE LAW OF ARMED CONFLICT 324 (1968) (arguing that the de facto element is indicative of the rule that actual effective control is a condition sine qua non of the law of occupation). “Only when, and where, the Occupying Power has attained unquestioned control does hostile territory become subject to the more exacting restraints of the law of belligerent occupation as compared with those of the laws of war in the strict sense.” *Id.*; *Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 166, ¶ 173 (Dec. 19) (holding that, to recognize the existence of occupation, an actual effective control is required over the territory and it is not sufficient to recognize a potential for such control). See, e.g., VON GLHAN, *supra* note 13, at 28 (“Territory is considered occupied when it is actually placed under the authority of the hostile army . . . . Thus there is assumed an invasion of the enemy state, resisted or unresisted, as a result of which the invader has rendered the enemy government incapable of publicly exercising its authority; the invader has successfully substitutes his own authority for that of the legitimate government in the territory invaded.”).

21. The definition of occupation in Article 42 of 1907 Hague Regulations distinguishes between “invasion” and “occupation,” although IHL does not provide an explicit definition for the term “invasion.” 1907 Hague Regulations, *supra* note 10, art. 42. Because of the unique and fluid experiences of each situation, it can be challenging to identify the precise moment when an invasion becomes an occupation. *Id.* In principle, the difference between an occupant and invader is that an occupant establishes an administration in a territory while an invader merely passes through the territory. *Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 166, ¶ 178 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 89–101 (July 9); MYERS S. MCDUGAL & F.P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 732–35 (1961); Kenneth Watkin, *Use of Force During Occupation: Law Enforcement and Conduct of Hostilities*, 94 INT’L REV. RED CROSS 267, at 272–73 (2012); GREENSPAN, *supra* note 18, at 213; Ferraro, *supra* note 15, at 135; Roberts, *supra* note 9, at 261; OXFORD MANUAL, *supra* note 16, art. 41; THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 19, § 11.3; Zwanenburg, *supra* note 16, at 108. For the debate among international law scholars over the distinction between invasion and occupation and whether an intermediate phase between the two exists until effective control over the territory is reached, see Zwanenburg, Bothe & Sassoli, *supra* note 17, at 29–50.

22. See Adam Roberts, *Occupation, Military, Termination of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW VOL. 7 930 (2011); VON GLHAN, *supra* note 13, at 29; Benvenisti, *Unilateral Termination*, *supra* note 7, at 373.

last few decades have been the use of air power, along with naval power and sophisticated military technology, to impose military pressure or blockades.<sup>23</sup> Now it is certainly possible for a hostile power to police a territory with minimal reliance on forces physically present on the ground, relying instead on the use of advanced technology in the air and sea.<sup>24</sup> The situations of invasion, blockade, military pressure, and belligerent occupation vary in multiple respects, including the physical presence of foreign military troops in foreign territory, the degree of effective control required for their establishment, and the different aspirations that the foreign forces hold in the specific situation.<sup>25</sup> Yet a military air or sea presence used to impose pressure or establish a blockade (constituting military aspirations short of occupation that fall under the laws of armed conflict) still does not invoke the law of belligerent occupation without the presence of military troops on the ground.<sup>26</sup> This kind of “hovering” or “bordering” presence does not allow the occupying state to physically carry out its main responsibility according to Article 43 of the 1907 Hague Regulations: to establish governmental control to ensure and restore public order and safety for the local population.<sup>27</sup> The military strength of a foreign army located

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23. Zwanenberg, *supra* note 16, at 106.

24. Eyal Benvenisti describes the situation of military power controlling air and naval territory as “virtual occupation”—modern armies’ remotely controlling foreign territory with advanced equipment to prevent a local government from functioning. Cf. BENVENISTI, *supra* note 2, at 54 (“There would be situation where the virtual control over a foreign territory is so effective that the local government cannot function and provide for the inhabitants. In such cases there is a strong argument that a *duty to occupy* arise, the virtual occupant having to send in ground troops to establish the necessary infrastructure to restore and ensure public order and secure the human rights of the inhabitants.”); see Ferraro, *supra* note 15, at 143; Zwanenburg, *supra* note 16, at 106, 126.

25. Cf. Benjamin Rubin, *Disengagement from the Gaza Strip and Post-Occupation Duties*, 42 ISR. L. REV. 528, 538 (2009); SCHWARZENBERGER, *supra* note 20, at 177; Zwanenburg, *supra* note 16, at 130.

26. See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 48 (2009); Hans-Peter Gasser, *Belligerent Occupation*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* para. 527 (D. Fleck ed., 2d ed. 2008); VON GLHAN, *supra* note 13, at 28–29; Ferraro, *supra* note 15, at 145.

27. See 1907 Hague Regulations, *supra* note 10, art. 42–56. The recognition of an occupation holds vital implications for the occupying state according to the ensuing duties assigned by the law of belligerent occupation. The 1907 Hague Regulations determine the rights of occupying powers in the conduct of operations and limit the means of doing harm that is not compatible with military necessity. The Fourth Geneva Convention safeguards military personnel placed “*hors de combat*,” as well as people not taking part in hostilities. For the main duties of the occupying power, see *id.*; Additional

outside the borders of a state or area is not in itself sufficient to constitute effective control. What matters is a foreign power's ability to establish effective control over civilian life within the occupied area and its capability of substituting its authority for that of the local government.<sup>28</sup>

#### B. THE END OF MILITARY OCCUPATION AND ITS CONSEQUENCES ACCORDING TO INTERNATIONAL HUMANITARIAN LAW

As discussed, given the lack of a legal definition of belligerent occupation, the end of an occupation can be understood as the reversal or unwinding of its commencement.<sup>29</sup> That is, the termination of a military occupation is a reversal of the situation that constituted a military occupation of a sovereign state or territory in the first place, or a reversion to what existed before the occupation. Therefore, the common legal assumption is that an occupation ends when the elements essential for the commencement (and duration) of one—including the physical presence of foreign forces, their ability to exercise effective control, and the lack of local government consent to their presence—cease to exist.<sup>30</sup>

As complex as it is to answer the question of when a territory is considered occupied, it is even more complex to determine the end of occupation based on its beginning. The determination of whether effective control has been transferred or lost must be considered on a case-by-case basis.<sup>31</sup> In many cases, however,

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Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter AP1]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27–34, 47–78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

28. Council Decision 2008/901/CFSP of Dec. 2, 2008, Concerning an Independent International Fact-Finding Mission on the Conflict in Georgia, 2008 O.J. (L 323/66); SCHWARZENBERGER, *supra* note 20, at 174; VON GLHAN, *supra* note 13, at 28. *See also* ROBERT KOLB & SYLVAIN VITÉ, LE DROIT DE L'OCCUPATION MILITAIRE: PERSPECTIVES HISTORIQUES ET ENJEUX JURIDIQUES ACTUELS 143, 149 (2009); Kenneth Watkin, *Use of Force During Occupation: Law Enforcement and Conduct of Hostilities*, 94 INT'L REV. RED CROSS 267, 299 (2012); MCDUGAL & FELICIANO, *supra* note 21, at 732–35; Benvenisti, *supra* note 8, at 6; Roberts, *supra* note 9, at 300.

29. Shany, *Faraway*, *supra* note 7, at 359; Ferraro, *supra* note 15, at 156.

30. *Id.* at 156.

31. Benvenisti, *Unilateral Termination*, *supra* note 7, at 375–76.

the lapse of time between the cessation of fighting and the signing of an agreement ending the war blurs the precise point in time when occupation responsibilities commence and terminate.<sup>32</sup> As discussed earlier, since establishing the Hague Regulations, some conditions, such as progressive phasing out, partial withdrawal, continued military presence on the basis of consent between the occupying power and the local government, maintenance of certain competences over the previously occupied area, or the evolution of the means of exercising effective control can complicate the legal classification of when an occupation has ended and duties are removed.<sup>33</sup>

In general and straightforward circumstances, an occupation would be terminated at the actual dispossession of the territory (or part of it) by the occupying power, regardless the cause of the dispossession.<sup>34</sup> According to scholars and international law bodies, the two widely accepted elements for defining the end of occupation are (1) the withdrawal of military forces from the territory; and (2) the loss of effective control over a territory or its transfer to a local power—that is, a legitimate government among the local population that is able to resume its authority and functions.<sup>35</sup> Drawing solely on the various army manuals, it is difficult to elucidate any further common or consistent criteria for the end of an occupation beyond the elements already discussed in Article 42 of the 1907 Hague Regulations.<sup>36</sup> The International Review of the Red Cross on

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32. U.S. DEP'T OF THE ARMY, PAMPHLET. NO. 27-161-2, INT'L L. V. II, 159–61 (1962).

33. Ferraro, *supra* note 15, at 134.

34. VON GLHAN, *supra* note 13, at 29.

35. LASSA FRANCIS OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. 2 DISPUTES, WAR AND NEUTRALITY 436 (1952); DINSTEIN, *supra* note 26, at 272; GREENSPAN, *supra* note 17, at 219. See SCHWARZENBERGER, *supra* note 20, at 317; Roberts, *supra* note 14, at 27.

36. It is accepted that military manuals might be valid evidence for state practice and might represent *opinion juris*, which would make them customary international law. *But see* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (5th ed. 1998). For the opposite opinion that military manuals are not necessarily an evidence of customary international law, see Nobou Hayashi, *National Military Manuals on the Law of Armed Conflict*, FICHL PUBLICATIONS SERIES NO. 2 1, 65 (2d ed. 2010), [http://www.fichl.org/fileadmin/fichl/documents/FICHL\\_2\\_Second\\_Edition\\_web.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_2_Second_Edition_web.pdf). The French Army Manual does not include any specification regarding the end of occupation; it simply repeats the principles of Article 42 of the 1907 Hague Regulations for the constituting occupation. FR. MINISTERE DE LA DEFENSE, MANUEL DE DROIT DES CONFLIT ARMÉS (2012), [http://www.cicde.defense.gouv.fr/IMG/pdf/20130226\\_np\\_cicde\\_manuel-dca.pdf](http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf). The German Army

Customary Law also fails to indicate any specific guidelines for the end of occupation.<sup>37</sup>

Military withdrawal is a preliminary condition for clearly identifying the end of occupation, and much emphasis has been placed on it by international law bodies and in legal writing.<sup>38</sup> Just as occupation cannot begin without the presence of a hostile army, military withdrawal necessarily indicates that occupation has ended.<sup>39</sup> This was, in fact, the recent decision of the

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Manual, although it emphasizes that “[o]ccupied territory does not include battle areas, i.e. areas which are still embattled and not subject to permanent occupational authority (area of invasion, withdrawal area). The general rules of international humanitarian law shall be applicable here.” GER. FEDERAL MINISTER OF DEFENCE, HUMANITARIAN LAW IN ARMED CONFLICT – MANUAL ¶ 528 (1992). The U.S. Army Manual also does not include explicit reference to the end of occupation but just emphasizes that: “*Occupation = Invasion + Firm Control*. The radius of occupation is determined by the effectiveness of control; occupation must be actual and effective.” U.S. DEP’T OF ARMY, LAW OF ARMED CONFLICT DESKBOOK III 122 (2012). Both the Canadian Army Manual and the Australian Army Manual include an explicit section for “termination of occupation” and detail the three ways occupation might end: (1) withdrawal from the territory; (2) ejection by force of the occupying power; and (3) annexation by the occupying power. The Australian Military Manual adds that valid legal annexation cannot occur while allies of the defeated sovereign nation are still in the field against the occupying power. OFFICE OF THE JUDGE ADVOCATE GENERAL, JOINT DOCTRINE MANUAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, B-GJ-005-104/FP-021, § 2, art. 1204 (Aug. 13, 2001) (Can.); AUSTRALIAN DEFENCE FORCE, LAW OF ARMED CONFLICT § 12.9 (2006). The United Kingdom’s military manual repeats the elements of military withdrawal and loss of effective control required for the end of occupation and elaborates: “11.7.1 The fact that some of the inhabitants are in a state of rebellion, or that guerrillas or resistance fighters have occasional successes, does not render the occupation at an end. Even a temporarily successful rebellion in part of the area under occupation does not necessarily terminate the occupation so long as the occupying power takes steps to deal with the rebellion and re-establish its authority or the area in question is surrounded and cut off. *Whether or not a rebel movement has successfully terminated an occupation is a question of fact and degree depending on, for example, the extent of the area controlled by the movement and the length of time involved, the intensity of operations, and the extent to which the movement is internationally recognized.*” UK MINISTRY OF DEFENCE, JSP 383 THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 11.7.1 (2004) (emphasis added).

37. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175 (2005); Roberts, *supra* note 22, § 54, at 9.

38. VON GLHAN, *supra* note 13, at 29; Roberts, *supra* note 22, § 20, at 4.

39. OPPENHEIM, *supra* note 18, at 562–63. Discussing the consequences of occupation, Oppenheim states that no other state can acquire an occupied territory unless the occupying power withdraws from it or has been successfully driven away by the local government without being able to re-occupy. This



European Court of Human Rights in its ruling on two cases regarding the aftermath of the Nagorno-Karabakh conflict between Armenia and Azerbaijan. The Court held that the physical presence of foreign troops is a *sine qua non* requirement of occupation and that military occupation is inconceivable without “boots on the ground.”<sup>40</sup>

The second indication that the law of occupation ceases to apply is the loss of effective control.<sup>41</sup> A fair legal ramification of the end of occupation is when an occupying power loses effective control, local authority over the occupied territory will be restored, even if it is not restored fully.<sup>42</sup> Yet in these situations it is equally unclear what level of effective control needs to be transferred to constitute the end of occupation. This is the “weak point” of the law of belligerent occupation, compounding the difficulties established by the lack of definition or standards for ending occupation.

There are various ways to end an occupation, and military withdrawal and transfer of effective control can take different forms.<sup>43</sup> The legal principle of the law of belligerent occupation assumes that the end of occupation is agreed-upon and includes a political arrangement or declaration, international treaties, international bodies’ resolutions, or political leaders’ statements that set the terms for military withdrawal and transfer of control to the local sovereign.<sup>44</sup> All would normally include provisions regarding the form of local government in the territory, any security arrangements, commitments according to international treaties, and economic and cultural relations with other states taking part in the arrangement.<sup>45</sup>

There are other ways of ending occupation, however, that do not involve the coordination of military withdrawal and transfer

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argument indicates that the existence of occupation, or vice versa—termination—depends upon the physical presence of military forces or their withdrawal. *Id.*

40. Sargsyan v. Azerbaijan, App. No. 40167/06, Eur. Ct. H.R. 28–29 (2015); Chiragov and Others v. Armenia, App. No. 13216/05, Eur. Ct. H.R. 33–35 (2015).

41. SCHWARZENBERGER, *supra* note 20, at 317.

42. YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 16 (2009); Benvenisti, *Unilateral Termination*, *supra* note 7, at 371.

43. Roberts, *supra* note 22, § 20, at 4.

44. *Id.*

45. SCHWARZENBERGER, *supra* note 20, at 172; Roberts, *supra* note 22, § 19, at 4.

of effective control. For example, the ousted local government might reinstate control over the territory by its legitimate armed forces or its allies in the area; the local population might set the territory free through uprisings and ultimately establish its own local government; the occupying power might take unilateral steps; or the United Nations (U.N.) Security Council (U.N. Security Council) might issue a binding resolution.<sup>46</sup>

The varied ways of ending an occupation bring forward a customary principle in international law that occupation should be terminated based on consent of the states involved, international norms and institutions, and the legitimacy of the local population.<sup>47</sup> Annexation is illegal according to customary international law; in this scenario there is a customary obligation to negotiate in good faith in an attempt to end any occupation.<sup>48</sup>

In situations where occupations end, state practice has been far from uniform; it can hardly fill in the blanks where legal instruments fail to set clear rules for cases where the end of occupation is not a defined, clear-cut moment concluded by peace agreement or treaty. For example, there are circumstances in which an occupation is widely accepted as terminated despite the fact that the intervening force remains in the territory, as with the United States military's occupation of Japan and the end of the Allied occupation of West Germany.<sup>49</sup> In these cases,

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46. ARAI-TAKAHASHI, *supra* note 42, at 150–51; Benvenisti, *Unilateral Termination*, *supra* note 7, at 371; Roberts, *supra* note 22, § 18, at 4; VON GLHAN, *supra* note 13, at 257.

47. Roberts, *supra* note 22, § 55, at 9–10.

48. *Id.*

49. Roberts, *supra* note 14, at 29; Security Treaty, Japan-U.S., art. 6(a), Sept. 8, 1951, 3 U.S.T. 3329 (“All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.”). With regards to the allied occupation of West Germany, the original text of the Paris Agreements, in particular Protocol I, states that occupation ended while allied forces remained in the territory. Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany (with Schedule of amendments), Oct. 23, 1954, 331 U.N.T.S. 253; Treaty on the Final Settlement with Respect to Germany with Agreed Minute, art. 7, Sept. 20, 1990, 1696 U.N.T.S. 115 (“(1) The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related

foreign forces remained in the territory after occupation's end with the consent of local government and as a result of an agreement between the parties.<sup>50</sup> In 2004, the U.N. Security Council recognized the end of the United States-led occupation of Iraq despite the fact that military troops remained in the territory of Iraq until 2011, retaining a substantive level of control over the territory.<sup>51</sup> The continued presence of the occupying powers in Iraq after the stated end of occupation was not accompanied by a security treaty, as was the case in Germany and Japan post World War II.<sup>52</sup>

The case of Afghanistan is another example of military troops remaining in a former occupied territory, although in this case the occupation was never formally recognized and the law

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quadripartite agreements, decisions and practices are terminated and all related Four Power institutions are dissolved. (2) The United Germany shall have accordingly full sovereignty over its internal and external affairs.”); Roberts, *supra* note 14, at 29.

50. DINSTEIN, *supra* note 26, at 270; Benvenisti, *Unilateral Termination*, *supra* note 7, at 371-82.

51. The presence of United States-led forces after the end of occupation was ratified by an agreement with the local temporary government. Although the presence of military troops in Iraq lasted nine years after the Security Council adopted a resolution declaring the end of United States-led forces occupation of Iraq, and the United States-led forces military presence was based on the explicit consent of the local Iraqi government and on particular agreements, it remains true that the United States-led coalition retained significant effective control and was highly involved in combat operations. It was possible because the Security Council Resolution recognized the end of occupation in Iraq and consequently the application of the law of belligerent occupation and authorized the ongoing presence of United States-led forces in territory. Not only did the occupying powers in Iraq retain external security control after the conclusion of occupation, as in the case of Japan and Germany, but also they also retained administrative and internal security authorities. See S.C. Res. 1546 (June 8, 2004) (“Welcoming the beginning of a new phase in Iraq’s transition to a democratically elected government, and looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004.”). See also ARAI-TAKAHASHI, *supra* note 42, at 20; DINSTEIN, *supra* note 26, at 273.

52. Agreement On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Iraq-U.S., Nov. 17, 2008, T.I.A.S. No. 09-101.1 <http://www.state.gov/documents/organization/122074.pdf> (stating that the Iraq-U.S. agreement was reached years after the stated end of occupation); Strategic Framework Agreement for a Relationship of Friendship and Cooperation, Iraq-U.S., Nov. 17, 2008, T.I.A.S. No. 09-101.1, <http://www.usf-iraq.com/wp-content/uploads/2012/12/security-agreement-2.pdf>. See also Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship, Iraq-U.S., Aug. 27, 2007 (no longer in force), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/print/20071126-11.html>.

of belligerent occupation did not technically apply.<sup>53</sup> Following the end of the unrecognized occupation, foreign troops continue to exercise some effective control similar to the control exercised during occupation to stabilize the country's regime and run counter-insurgency operations (including policing functions).<sup>54</sup> Their stay, however, is acceptable to the legitimate local government, and the foreign presence is therefore no longer considered to be akin to an occupying power with obligations according to the law of belligerent occupation. The pertinent question is whether the consent between the parties to the ongoing presence of the former occupying power in the territory would negate the requirements of the law of belligerent occupation, if occupation had been formally declared.<sup>55</sup>

State practice was also notably inconsistent in the case of the unilateral action taken by Israel's withdrawal from Gaza in

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53. United States-led forces launched campaigns against the Taliban regime starting on October 6, 2001, and lasting throughout the occupation of Afghanistan. There is no consensus among legal authorities as to when exactly this occupation ended. The view of the ICRC was that the occupation of United States-led forces ended with the establishment of the Afghan transitional government in June 19, 2002. *International Humanitarian Law and Terrorism: Questions and Answers*, ICRC (Jan. 1, 2011), <https://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>. For legal analysis of the Afghanistan conflict, see ELIZABETH WILMSHURST, *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 242-79 (2012); A. Bellal, G. Giacca & S. Casey-Maslen, *International Law and Armed Non-State Actors in Afghanistan*, 93 INT'L REV. RED CROSS 52 (2011).

54. S.C. Res. 1510, art. 1 (Oct. 13, 2003) ("Authorizes expansion of the mandate of the International Security Assistance Force to allow it, as resources permit, to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs, so that the Afghan Authorities as well as the personnel of the United Nations and other international civilian personnel engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement."). S.C. Res. 1386, art. 1 (Dec. 20, 2001) ("Authorizes, as envisaged in Annex 1 to the Bonn Agreement, the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment."). See also Enduring Strategic Partnership Agreement, Afg.-U.S., May 2, 2012, T.I.A.S. No. 12-704, <https://www.state.gov/documents/organization/196855.pdf>; President, George W. Bush, The President's News Conference With President Hamid Karzai of Afghanistan (May 23, 2005), <http://www.presidency.ucsb.edu/ws/index.php?pid=73643>; Mark Landler, *U.S. Troops to Leave Afghanistan by the End of 2016*, N.Y. TIMES (May 27, 2014), <https://www.nytimes.com/2014/05/28/world/asia/us-to-complete-afghan-pullout-by-end-of-2016-obama-to-say.html>.

55. Roberts, *supra* note 22, § 27, at 5.

2005, which involved the evacuation of all Israeli settlements and military forces from the territory *without* coordination with the local government and the international community.<sup>56</sup> In the

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56. On June 6, 2004, Israel's Cabinet adopted a resolution regarding the Disengagement Plan from Gaza and the northern West Bank. As to Gaza, the Cabinet's decision was as follows:

- 1) The State of Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") as detailed below.
- 2) Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces in the areas of Gaza Strip territory which have been evacuated.

Cabinet Resolution Regarding the Disengagement Plan art. 3.1, June 6, 2004, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/revised%20disengagement%20plan%206-june-2004.aspx>.

On September 12, 2005, Israel unilaterally withdrew from Gaza and evacuated all Israeli settlements within Gaza while retaining control over the air, sea, and land passages of persons and goods into Gaza from Israel. Following the withdrawal of all military forces, the Israel Defense Forces (IDF) commander in Gaza signed a declaration terminating the military administration operations in the territory. Manifest Regarding Termination of Military Rule (Manifest No. 6) (Gaza Region) 5765-2005. *See also* Press Release, IDF Spokesman, Exit of IDF Forces from the Gaza Strip Completed, (Sept. 12, 2005), <http://www.mfa.gov.il/mfa/pressroom/2005/pages/exit%20of%20idf%20forces%20from%20the%20gaza%20strip%20completed%2012-sep-2005.aspx> ("Tonight, September 12, 2005 the Head of the Southern Command, Maj. Gen. Dan Harel signed a declaration stating the end of military rule in the Gaza Strip. This follows the evacuation of all IDF forces from the region and the handing over of control of the region to the Palestinian Authority; in accordance with the decision of the Israeli Government. This declaration annuls the declaration signed June 6, 1967 by the former Head of the Southern Command, Maj. Gen. Yishayahu Gavish declaring the start of military rule in the area. This is the final legislative act taken by an IDF commander in the Gaza Strip after 38 years of IDF presence in the region."). In an attempt to achieve international recognition for the end of its responsibility, Israel surrendered its complete control over Gaza by signing the Agreement on Movement and Access (AMA) with the Palestinian Authority (PA). Agreement On Movement and Access and Agreed Principles for the Rafah Crossing, Isr.-P.A., Nov. 17, 2005, <http://www.state.gov/s/l/2005/87237.htm>.

In June 2007, Hamas gained control over Gaza and since then has operated all governmental authorities in the area. For Israel's official standpoint that its effective control over Gaza ended after its 2005 withdrawal, see TURKEL COMMISSION, REPORT OF THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 28 (2010), <http://www.turkel-committee.com/files/wordocs/8707200211english.pdf>.

For the international community's standpoint that Israel remains an occupying power in Gaza despite the 2005 disengagement, *see, e.g.*, Office of the Prosecutor of the International Criminal Court (ICC), *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, ¶ 16 (Nov. 6, 2016); S.C. Res. 1860 (Jan. 8, 2009); Human Rights Council, Rep. of the United Nations

absence of coordination, and without any practice or standards that would encourage such coordination, the end of occupation was not formally recognized. That does not mean, however, that Israel continues to or even has the practical ability to carry out duties according to the law of belligerent occupation, mainly because it has no military troops on the ground, and the local government has been exercising governmental control since 1993.<sup>57</sup> However, since Hamas took over governmental authority in the Gaza Strip in 2007, the result is that the territory has been left in some aspects without responsible formal power; while Israel no longer performs duties according the law of belligerent occupation, the local government is unwilling to independently maintain all necessary governmental authorities for the local population.<sup>58</sup>

The international community and the U.N. play a major role in setting principles and recognizing the end of an occupation when the terms are not finalized in a peace agreement or treaty.<sup>59</sup> Unfortunately, in many historical cases, the U.N. refrained from recognizing occupations in the first place and left the events unanswered.<sup>60</sup> As mentioned, only two cases exist where the law of belligerent occupation was invoked and

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Fact-Finding Mission on the Gaza Conflict: Human Rights in Palestine and Other Occupied Arab Territories on Its Twelfth Session, ¶ 276, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009); John Dugard (Special Rapporteur of the Commission on Human Rights), *Question of the Violation of Human Rights (Either All Lower or All Upper) in the Occupied Territories, Including Palestine*, U.N. Doc. E/CN.4/2006/29 (Jan. 17, 2006).

For the debate on the legal status of Gaza among international scholars since Israel's withdrawal in 2005, see Robert A. Caplen, *Rules of "Disengagement": Relating the Establishment of Palestinian Gaza to Israel's Right to Exercise Self-Defense as Interpreted by the International Court of Justice at Hague*, 18 FLA. J. INT'L L. 679 (2006); Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915 (2010); BENVENISTI, *supra* note 2; Shany, *Faraway*, *supra* note 7; Rostow, *supra* note 14.

57. HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister. ¶¶ 12–15 (2008) (Isr.) (unpublished), [http://elyon1.court.gov.il/files\\_eng/07/320/091320.n25.htm](http://elyon1.court.gov.il/files_eng/07/320/091320.n25.htm).

58. *Id.*

59. See e.g., *Ending occupation only way to lay foundations for lasting Israeli-Palestinian peace – UN officials*, UN NEWS CENTRE (June 29, 2017), <https://www.un.org/apps/news/story.asp?NewsID=57087#.WgfKVmhSw2w> (giving an example of the UN playing a role in an attempt to recognize the end of an occupation).

60. FLECK, *supra* note 14, at 276. For example, the Soviet presence in Afghanistan from 1979-1989; the United States invasion and occupation of Grenada in 1983 and of Panama in 1989; and the Iraqi occupation of Kuwait in 1991 were all unrecognized by the U.N. *Id.*

adhered to by an occupying state: the Coalition forces' presence in Iraq in 2003 and Israel's in Gaza and the West Bank since 1967.<sup>61</sup>

The current case of Cyprus and Turkey presents a relevant example for the role the international community plays in setting principles for occupation and its end. In general, Turkey's long-term occupation of Northern Cyprus and its accordance with international law have attracted little attention from the international community.<sup>62</sup> During the first years of the occupation, only non-binding U.N. General Assembly resolutions called for respect of the right of refugees to return and to repossess the property they owned.<sup>63</sup> After a number of failed attempts, the Secretary General appointed a Special Adviser on Cyprus in 2014 to assist the parties in the conduct of negotiations aimed at reaching a comprehensive agreement.<sup>64</sup> Since 2014, however, no major negotiation efforts have been taken and the occupation is still unresolved.

Russia's activities in Georgia and Crimea also explicate the inconsistent treatment of occupations versus territorial annexations by the U.N. and the international community. In 2008, Russia occupied significant undisputed areas in Georgia as part of the conflict over South Ossetia and Abkhazia, creating a buffer zone under the full control of its forces.<sup>65</sup> None of the U.N. bodies have recognized the situation as either annexation or occupation, despite the fact that the Parliamentary Assembly of the European Union and the European Union Independent International Fact Finding Mission did.<sup>66</sup> According to Russia, Abkhazia and South Ossetia are not occupied territories but independent states.<sup>67</sup> However, no international or domestic

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61. BENVENISTI, *supra* note 2, at 9, 203.

62. S.C. Res. 360 (Aug. 16, 1974).

63. BENVENISTI, *supra* note 2, at 306.

64. S.C. Res. 774 (Aug. 25, 1992); S.C. Res. 1475 (Apr. 14, 2003); Press Release, Secretary-General, Secretary-General Appoints Espen Barth Eide of Norway as Special Adviser on Cyprus, U.N. Press Release SG/A/1498 (Aug. 22, 2014).

65. Application of the International Convention on the Elimination of Racial Discrimination (Geor. v. Russ. Fed.), Order on Provisional Measures, 2008 I.C.J. 353 (Oct. 15).

66. Eur. Parl. Ass., *The consequences of the war between Georgia and Russia*, Res. 1633 (2008), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17681&lang=en>; Council Decision 2008/901/CFSP, 2008 O.J. L 323/66 (EU), <http://www.refworld.org/docid/4ac45cd22.html>; WILMSHURST, *supra* note 53, at 318–26.

67. See Philip P. Pan & Jonathan Finer, *Russia Says 2 Regions in Georgia*

legal act can justify the Russian military invasion of the sovereign territory of Georgia, or the recognition of the self-proclaimed independence of Georgian separatist regions by Russia.<sup>68</sup> It is obvious that Russia intends to annex these territories—an illegal act according to international law that should be treated accordingly by the international community.<sup>69</sup>

In 2014, Russia also occupied Crimea in an attempt to effect annexation. Following the occupation, Crimea and Sevastopol held referenda on the question of whether to join the Russian Federation, yet it was widely suspected that these referenda were conducted not by locals, but by pro-Russian authorities.<sup>70</sup> To date, only Russia and four other U.N. members—Afghanistan, Nicaragua, Venezuela, and Syria—have recognized the validity of the referenda.<sup>71</sup> The General Assembly adopted a non-binding resolution considering the referenda as non-binding and reaffirming Ukraine’s territorial integrity.<sup>72</sup> However, until very recently, neither the U.N. nor the international community had recognized Russia as an occupying state in Crimea.<sup>73</sup> On December 19, 2016, the U.N. General Assembly passed a resolution that declared Russia an “occupying power” in Crimea and recognized Crimea as “temporarily occupied” by Russia.<sup>74</sup>

The varied reactions of the international community to these events reveal the inconsistency in its own standards with respect to ending occupation. Such inconsistency reflects the political interests and aspirations behind each case, rather than

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Are Independent, WASHINGTON POST (Aug. 26, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/26/AR2008082600996.html>.

68. LAW LIBRARY OF CONGRESS, RUSSIAN FEDERATION: LEGAL ASPECTS OF WAR IN GEORGIA (Sept. 2008), <http://www.loc.gov/law/help/legal-aspects-of-war/russia-legal-aspects-of-war.pdf>.

69. *Id.*; *Russia-Proposed Treaty with Abkhazia on ‘Alliance and Integration’*, CIVIL.GE (Oct. 13, 2014, 11:39 PM), <http://civil.ge/eng/article.php?id=27714>.

70. David Adesnik, *How Russia Rigged Crimean Referendum*, FORBES, (Mar. 18, 2014, 09:58 AM), <https://www.forbes.com/sites/davidadesnik/2014/03/18/how-russia-rigged-crimean-referendum/#4c2fd4b46d41>.

71. Jeremy Bender, *These are the 6 Countries on Board with Russia’s Illegal Annexation of Crimea*, BUSINESS INSIDER- DEUTSCHLAND, (May, 31, 2016, 6:16 PM), <http://www.businessinsider.de/six-countries-okay-with-russias-annexation-of-crimea-2016-5?r=US&IR=T>.

72. G.A. Res. 68/262 (Mar. 27, 2014); Roberts, *supra* note 22, § 43, at 8.

73. In 2015, the U.N. Security Council adopted resolution that reaffirms the full respect for the sovereignty, independence and territorial integrity of Ukraine. See S.C. Res. 2202 (Feb. 17, 2015).

74. G.A. Res. 71/205 (Dec. 19, 2016).



the exercise of measured, pragmatic treatment according to coherent legal standards.

### III. WEAKNESSES OF THE TRADITIONAL LEGAL PARADIGM OF THE END OF OCCUPATION

#### A. THE LEGAL PARADIGM OF THE LAW OF BELLIGERENT OCCUPATION

As mentioned, it is well established in the law of occupation that the transition from belligerent occupation to territorial sovereignty regained must be considered with respect to three different actors: the departing occupier, the returning legitimate sovereign, and the affected civilian population.<sup>75</sup> It is also accepted that when occupation begins and the occupying power is subject to the rules of the law of belligerent occupation, it acts under two fundamental legal principles that have been in effect since the 19th century.<sup>76</sup> The first is the protection of the occupied civilian population by, *inter alia*, ensuring and restoring its public order, security, and essential needs as much as possible.<sup>77</sup> This first principle of civilian protection has been grounded in international humanitarian law ever since the adoption of the Preamble of the 1899 Hague Regulations. This Article, commonly called The Martens Clause, states that International Humanitarian Law (IHL) protects civilians and belligerents, even in situations arising from armed conflict that were not anticipated by specific treaty provisions.<sup>78</sup> Since the initial adoption of the 1899 Hague Regulations, the wording of the preamble has appeared in every major humanitarian treaty, including the 1907 Hague Regulations and the Fourth Geneva Convention.<sup>79</sup> This clause was defined by the Nuremburg Trials

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75. SCHWARZENBERGER, *supra* note 20, at 346.

76. Benvenisti, *supra* note 8, at 16.

77. 1907 Hague Regulations, *supra* note 16, pmbl.

78. 1899 Hague Convention, *supra* note 16, pmbl ("Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.").

79. AP1, *supra* note 27, art. 1(2); 1907 Hague Regulations, *supra* note 16, pmbl; Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125, 125–26 (1997).

as the “legal yardstick” that every military act not governed by specific provisions must be judged upon.<sup>80</sup> In its *Advisory Opinion on the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ) stated that the Marten Clause protects civilian populations, emphasizing its relevancy as an integral part of IHL, regardless of subsequent developments in military technology.<sup>81</sup>

The second principle that the occupying power is subject to under the law of occupation is ensuring the “temporary” nature of occupation. The means, governance by the occupying state is colored by the expectation of the eventual return of the legitimate (even if temporarily ousted) sovereign to its preexisting right and responsibilities of governance of the occupied territory and its civilian population.<sup>82</sup> This second principle that occupation is a time-limited state of affairs, not amounting to sovereignty and pending a peace agreement, is exemplified in the law of belligerent occupation by three aspects: (1) the prohibition of annexation, firmly established in the customary law;<sup>83</sup> (2) rules regarding the occupier’s structure of authority during occupation;<sup>84</sup> and (3) rules regarding the maintenance of existing legislation in the occupied territory.<sup>85</sup>

Whatever the driving force, the rules governing the end of occupation (*postliminium*) signal restoration of the legal *status quo* before the belligerent occupation (as opposed to *uti possidetis*, which signifies the maintenance of the status quo).<sup>86</sup> *Postliminium* means that the legitimate sovereign *automatically* reassumes full authority and responsibility for the former occupied territory with the termination of its occupation.<sup>87</sup> From the point of view of the occupying power, an alternate meaning of the end of occupation according to the IHL paradigm is that the occupying state’s responsibilities are

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80. Theodor Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78, 79–80 (2000).

81. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

82. BENVENISTI, *supra* note 2, at 76; Benvenisti, *supra* note 8, at 1–2; FLECK, *supra* note 14, at 273; GRABER, *supra* note 16, at 43–47.

83. SCHWARZENBERGER, *supra* note 19, at 172.

84. 1907 Hague Regulations, *supra* note 10, arts. 53–55.

85. 1907 Hague Regulations, *supra* note 10, art. 43; Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 584 (2006).

86. SCHWARZENBERGER, *supra* note 20, at 317.

87. GREENSPAN, *supra* note 18, at 605.

*automatically* alleviated.<sup>88</sup> The law of occupation assumes that this is a defined moment when full compatibility exists between the transfer of effective control from the occupying power to the local, legitimate sovereign and reversion to the latter's rights and obligations of sovereignty. One withdraws from governance, and the other enters to carry it forward.

The cleanest situation of this "handover" is when occupation and the conflict come to an end simultaneously through a peace agreement or similar instrument. However, even under the traditional law of occupation, occupations often come to end in the midst of an armed conflict that continues apace. German forces occupying parts of France in World War II, for example, were forced to withdraw as part of a general retreat that was far from the end of the war itself.<sup>89</sup> The general paradigm of the law of occupation, even in cases where the conflict itself does not end, is that the withdrawal of the enemy's occupying forces provides the opening for the legitimate sovereign to return and take up its rights and obligations of sovereignty.

#### B. PARADIGMATIC WEAKNESSES OF THE LAW OF BELLIGERENT IN CONTEMPORARY SITUATIONS OF OCCUPATION

While the binary model of the law of belligerent occupation has the merit of clarity with respect to sovereignty and governance, it nonetheless has at least three weaknesses from the standpoint of the fundamental policies underlying it. The first is the concept of "effective control" in occupation. Effective control is defined as the ability of the occupier to exercise governmental control, stepping into the shoes of the ousted sovereign for a limited time period.<sup>90</sup> The presence of hostile troops in the territory is essential. For example, in a world where the ability to remotely, "constructively occupy" a territory through advanced technology exists, such "occupation" is still merely influencing the government and does not constitute true effective control. The ambiguous language that allows legal analysis to view effective control as a separate element from military presence on the ground in determining occupation

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88. SCHWARZENBERGER, *supra* note 20, at 317.

89. See, e.g., *1944 Liberation of Paris*, HISTORY, <http://www.history.com/this-day-in-history/liberation-of-paris> (last visited Oct. 6, 2017).

90. 1907 Hague Regulations, *supra* note 10, arts. 42–43.

neglects its core, intended meaning.<sup>91</sup>

The binary approach to occupation, whether beginning or end, admirably respects sovereignty and governance of the legitimate sovereign through the principle of temporality. But, this approach causes one to view occupation in a vacuum. A second weakness is manifested in how the possibility that the inability or unwillingness of the legitimate sovereign to take over the functions of governance (particularly when the occupier has withdrawn and given up its rights and obligations as occupier) is left open, exposing the civilian population to humanitarian or other risks. The binary model of the law of occupation, in other words, assumes a sovereign that is able and willing (after, perhaps, some negotiated period of transition and handover) to revert to its rights and obligations of governance. This may not always be the case, and if so, the civilian population can find itself at risk through a vacuum of governance authority.

The third weakness emerges in the many contemporary conflict and end-of-occupation scenarios that simply do not fit this tidy binary model.<sup>92</sup> These include situations of civil war or strife occurring alongside the conflict that led to occupation; situations in which no one admits to being either the occupier or, in some conditions, an “ousted” legitimate sovereign, and, hence, no party admits to any obligations toward the civilian population; situations of humanitarian intervention or the “responsibility to protect;” or situations in which an international body (i.e., the U.N. Security Council) has endorsed armed intervention resulting not merely in a new administration invested with the country’s sovereignty, but a fundamental change in the nature of governance.<sup>93</sup> In this final

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91. *Id.*; BENVENISTI, *supra* note 2; Zwanenburg, *supra* note 16, at 106, 126.

92. “Contemporary Conflict” is often used to refer to the prevailing pattern of political and violent conflicts at the beginning of the twenty-first century. Particularly, contemporary armed conflicts refer only to those that involve the use of force. *See, e.g.*, OLIVER RAMSBOTHAM, TOM WOODHOUSE & HUGH MIAL, CONTEMPORARY CONFLICT RESOLUTION: THE PREVENTION, MANAGEMENT AND TRANSFORMATION OF DEADLY CONFLICT 29 (2d ed. 2005). Contemporary occupations in this context refer to conflicts and occupations (acknowledged or not) that share features with, yet remain different from, those covered by the traditional law of belligerent occupation.

93. In some cases, the objective of the occupation is not to fight another state, but to fight non-state actors acting within states located far away from the occupying power that are considered as a security threat to one, or perhaps many, states (i.e. Taliban and Al-Qaeda in Afghanistan, Hezbollah in Southern Lebanon). The objective might sometimes be to install a new government as a

case, what began as an “occupation” under the law of belligerent occupation could be successively transformed into a quasi-trusteeship under the blessing of international organizations, eventually enabling the establishment of a fully recognized sovereign. In this scenario, any remaining foreign forces are present by sovereign consent.

When the traditional law of occupation was first conceived, occupations were a hostile army’s strategic tool in the quest for victory. Belligerent occupation was not—and is not today, despite a greater emphasis on civilian protection—a neutral institution designed to create a zone of stability to protect civilians.<sup>94</sup> As such, control of territory is legally permitted through the presence of a hostile state’s troops, for reasons of military necessity.<sup>95</sup> The occupying state is allowed to privilege its military security needs while protecting the local population and the territory’s (ultimate) sovereignty as much as possible.<sup>96</sup> In other words, the rules of belligerent occupation remain the same. The strategic goal of many (though not necessarily all) contemporary occupations, by contrast, is not to gain territory, whether for reasons of outright conquest or as a matter of military necessity. In some cases, the objective of the occupation is not to fight another state, but to fight non-state actors acting within states located far away from the occupying power that are considered a security threat to one or more states (e.g. Taliban and Al-Qaeda in Afghanistan, Hezbollah in Southern Lebanon).<sup>97</sup>

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means to end or prevent mass atrocities and human rights abuses, as was the case in Libya. It might sometimes take place under the authority of the Security Council (e.g., East Timor), under the authority of a regional security alliance (e.g., NATO in Kosovo), or it might take place unilaterally (the United States invasion of Iraq).

94. Benvenisti argues that since the adoption of the Fourth Geneva Convention (focusing on individuals rather than governments, and encompassing occupations that “m[et] no armed resistance”), an occupation’s regime does not depend on the existence of a formal state of war or on the armed resistance to the occupant. Therefore, in his view, the scope of the law must extend beyond the confines of war and the proper definition of occupation is “a situation where the forces of one or more states - including peace-keeping forces or forces of international organizations—exercise effective control over a territory of another state without the sovereign’s volition.” See BENVENISTI, *supra* note 2, at 80; Benvenisti, *supra* note 8, at 2.

95. 1907 Hague Regulation, *supra* note 10, arts. 42–43.

96. *Id.*

97. See *Timeline: US Intervention in Afghanistan 2001 to 2017*, AL JAZEERA, <http://www.aljazeera.com/news/2017/08/2001-2017-intervention-afghanistan-170822035036797.html> (last visited Oct. 7, 2017); see also 2006:

In other circumstances, the objective of military action leading to occupation by foreign forces is to end a regime by installing a new government as a means to end or prevent mass atrocities and human rights abuses, as was the case of the 2011 intervention in Libya.<sup>98</sup> Occupation may aim to prevent crimes against humanity, genocide, or mass atrocities and ethnic cleansing, by separating a territory from the security control of the central government, as with North Atlantic Treaty Organization (NATO)'s 1999 intervention in Kosovo.<sup>99</sup> Such action may take place under the authority of the U.N. Security Council (e.g., East Timor), under the authority of a regional security alliance (e.g., NATO in Kosovo), or it may take place unilaterally, as with the United States invasion of Iraq in 2003.<sup>100</sup> Military action could also take the form of an invasion and occupation of sovereign territory by foreign forces on the grounds of protecting an ethnic minority that is the same as the invading state's ethnicity, or to protect the "self-determination" of such an ethnic or linguistic minority. These justifications were offered by Russia for its entry into Crimea in 2014, even as it also denied that its forces were in fact present in the conflict, let alone enacting an "occupation."<sup>101</sup>

In characterizing the main features of contemporary conflicts that do not fit the legal paradigm of the end of military occupation, it can be stressed that these are situations where ending occupation is a process and not a specific moment, and/or situations where peace or the end of conflict is not the obvious precondition to, or consequence of, the end of occupation.

These contemporary situations matter to the analysis of occupation law because most (if not all) of them feature a party to the conflict which departs sharply from the law of occupation's fundamental legal principles of temporality and acknowledgment of reversion to the legitimate sovereign, or the

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*Lebanon War*, BBC (May 6, 2008, 5:18 PM GMT), [http://news.bbc.co.uk/2/hi/middle\\_east/7381389.stm](http://news.bbc.co.uk/2/hi/middle_east/7381389.stm).

98. On March 19, 2011, a multi-state NATO-led coalition began a military intervention in Libya ostensibly to implement Security Council Resolution. S.C. Res. 1937 (Mar. 17, 2011).

99. See Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 SURVIVAL 102, 102-23 (1999).

100. S.C. Res. 1236 (May 7, 1999) (proposing the United States assist with the East Timor Special Autonomy Referendum); Roberts, *supra* note 99; *Iraq War Illegal, Says Annan*, BBC (Sept. 16, 2004, 09:21 AM), [http://news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm).

101. See Benvenisti, *supra* note 8, at 16; SCHWARZENBERGER, *supra* note 20, at 346.

principle of minimal intervention of the occupying power in the administration of the local population.<sup>102</sup>

### 1. Transformative Occupation

Transformative occupation is a good example where the aforementioned binary structure is ill-suited, disrupting the balance of two of the fundamental principles of the law of occupation—civilian protection and temporality.<sup>103</sup> Contemporary transformative occupations are often perceived as situations where “good” occupying states take control over “bad” regimes.<sup>104</sup> As noted, this is inconsistent at best with the historical assumption of the law of occupation that aims to avoid judging whether the occupiers are the “good” actors and the ousted sovereign the “bad” actor. Such law supports reversion to the ousted, yet legitimate sovereign.<sup>105</sup> If anything, the Fourth Geneva Convention is suspicious of occupation becoming a form of annexation—as in the case of Nazi Germany in Eastern Europe and the Soviet Union.<sup>106</sup> There is little doubt, however, that the 1949 drafters were fully cognizant of the paradigmatically “transformative occupations” of Germany and

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102. See 1907 Hague Regulations, *supra* note 10, arts. 43, 53–55; GREENSPAN, *supra* note 18, at 605; SCHWARZENBERGER, *supra* note 20, at 317; Roberts, *supra* note 85.

103. One consequence of this dynamic today is an emphasis on “occupation” defined as a territory subject to the control of a foreign state through the presence of its forces. In contrast to “occupation” as the outcome of war or hostilities (by referring to the *process* e.g. a military invasion), the latter definition is seldom used today as it tends to engage a debate that many sovereigns would prefer to avoid. Specifically, the debate regarding the legality or illegality of an occupation by reference to the legality of the underlying conflict. Particularly where the territory has come to be under the administration or authority of international organizations and even more where the legality of the resort to force that eventually led to international administration is contested, it is more acceptable today to define occupation as “neutrally” as possible. One way to do so is to refer to “control of territory by outside entities” through the presence of foreign armed forces, whether it be state occupation or international administrations. Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT’L L. 695, 697 (2005); Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 LOY. L.A. INT’L COMP. L. REV. 85, 89 (2009); ARAI-TAKAHASHI, *supra* note 42, at 16; BENVENISTI, *supra* note 2.

104. Roberts, *supra* note 85, at 601.

105. *Id.*

106. *Id.* at 582–85.

Japan.<sup>107</sup>

Transformative occupation is characterized in today's world by the lack of territorial aspiration from the occupying states and acceptance of duties with respect to the civilian population's needs as a result of regime change.<sup>108</sup> The explicit goals are often to change states that have failed or are existing under tyrannical rule.<sup>109</sup> A number of examples, including the aftermath of World War II and Iraq since 2003, show that transformative political objectives can sometimes arise in occupations or in situations resembling occupation (as in the U.N.'s administration of post-conflict territory).<sup>110</sup> As occupying forces have engaged in armed conflict with *jus ad bellum* aims that essentially alter the nature of the legitimate sovereign to which the territory is supposed to revert (including abolishing it as a government, or perhaps banishing it from the occupied territory), these forces have covered increasingly extensive areas of administration over the occupied civilian population. If a war's aim is to put boots on the ground to end a regime and quite possibly make a change in its political character (establishing democratic governance, for example), the presence of forces and their security may well require occupation for some period (as in the case of the United States in Iraq), and concomitantly, greater responsibility for civilian needs and administration.<sup>111</sup> One could question the ability of the law of occupation in its traditional sense to successfully navigate contemporary situations in which the meaning of its fundamental principles (protection of local population and temporality) seem unavoidably under stress.

Occupations aimed at regime change usually contain transitional periods that run from the end of occupation through the restoration of a new government invested with sovereignty.<sup>112</sup> Exactly how these transformative occupations proceed, however, is variable. The end of occupation in such situations is not a moment in time but a gradual evolution of both the authority of local government and its acquisition of legitimacy with the local population.<sup>113</sup>

In addition, the lines between war and peace are blurred

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107. *Id.* at 601–03.

108. BENVENISTI, *supra* note 2, at 275.

109. Roberts, *supra* note 85, at 580.

110. *Id.* at 581.

111. *Id.*

112. *See supra* notes 47–52.

113. BENVENISTI, *supra* note 2, at 255.



when occupation is not strictly a security measure in the midst of an interstate war. Whereas war often contains clear, long-term goals for the parties, peace agreements or other instruments that aim to settle a conflict are not necessarily relevant to the end of many contemporary occupations.<sup>114</sup> After all, in transformative conflicts and occupations featuring regime change, there is no longer a “hostile” sovereign party to reach peace with; there may instead be a newly installed interim government, existing with or without international approval, with which the occupier can sign an agreement giving consent to the presence of its forces.<sup>115</sup> Such legal processes are simply not what the law of occupation contemplates as constituting agreements to end the conflict or to end the occupation administration and return the occupied territory to its ongoing, legitimate—even if *losing*—sovereign.

Transformative conflict in the post-Cold War period has typically not been governed by appeal to the law of belligerent occupation but instead by other bodies of law, particularly the Resolutions of the Security Council. The 2003 United States-led forces’ invasion and occupation of Iraq, a case where a state admitted that it was an occupier under the law of occupation, is the exception, not the rule. In Kosovo and East Timor, for example, the circumstances of international politics and diplomacy removed transformative conflicts from the purview of the law of occupation to other structures of international law and institutions, including the Security Council.<sup>116</sup> This rendered it unnecessary to acknowledge the ways in which the law of occupation failed to address such situations.<sup>117</sup>

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114. Gabriella Blum, *The Fog of Victory*, 24 EUR. J. INT’L L. 391, 391–421 (2013); Rostow, *supra* note 14, at 219.

115. See Ratner, *supra* note 103, at 699 n.15. For example, the goal of the occupation in Iraq was to accomplish regime change in favor of democracy. However, the occupation in Iraq ended before this goal was achieved, and a transitional government was installed as a result. The same is true in Afghanistan. The goal of the occupation was to fight Al-Qaeda and the Taliban following the September 11, 2001 terrorist attacks. Here, the occupation also ended before that goal was achieved, and the presence of the former occupying states’ forces has continued for many years. Blum, *supra* note 114, at 400.

116. Hilary Charlesworth, *Law After War*, 8 MELB. J. INT’L L. 233, 236 (2007).

117. *Id.*

## 2. Lengthy Occupation

Beyond transformative occupation, cases of continuing, lengthy occupation, particularly in geographically adjacent territories, offer another reason for some commentators to question the relevance of the law of occupation as an adequate paradigm in contemporary conflicts.<sup>118</sup> Despite the definition and normative principle of occupation as always and necessarily a temporary measure, since 1945, several occupations have persisted long after hostilities ceased. These cases include Israel's control over Gaza and the West Bank, Turkey's control over Northern Cyprus, Morocco's control over Western Sahara, Indonesia's control over East Timor and South Africa's control over Namibia.<sup>119</sup> The main problem with prolonged occupation is eventual dependency on the occupying state by the local population. Dependency is manifested, as noted in the example of Gaza, through services the occupying state provides to the local population in the occupied territory, including transportation, education, health services, financial services, infrastructure, employment options, etc.<sup>120</sup> Disconnecting and "unwinding" such a long-standing dependence will often require considerable time, and in many cases, the process requires a significant transitional period of transferring power to local authorities.<sup>121</sup> During this period, from the end of occupation

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118. Vaïos Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?*, 94 INT'L REV. RED CROSS 165, 170-71 (2012); Roberts, *supra* note 85, at 582..

119. See generally Roberts, *supra* note 85, at 582. For background on Israel's prolonged occupation of Gaza and the West Bank, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9). For background on Turkey's prolonged occupation of Northern Cyprus, see Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. ¶ 70, 75-76 (May 10). For background on Morocco's prolonged control over Western Sahara, see U.N. S.C., Rep. of the Secretary-General on South Sudan, U.N. Doc. S/2014/158 (Apr. 10, 2014). For background on Indonesian long-term control of East Timor (until 2002), see Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶ 13-17 (June 30). For a discussion of South African long-term control of Namibia (until 1990), see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21).

120. See generally Al-Bassiouni, *supra* note 3.

121. Beit Sourik Village Council v. The Government of Israel et al., Judgment, HCJ 2056/04, ¶ 27 (June 30, 2004), [http://elyon1.court.gov.il/Files\\_ENG/04/560/020/A28/04020560.A28.pdf](http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf); ANTONIO CASSESE, THE HUMAN DIMENSION OF INTERNATIONAL LAW 257 (2008); Koutroulis, *supra* note 118, at

until full restoration of local authority, the local population is at risk of being left unprotected.

### 3. Unilateral Termination of Occupation

Unilateral conflict management is intended to persuade the other side to refrain, restrain or even end violence through the adoption of unilateral strategies.<sup>122</sup> One of these is a separation strategy—unilateral disengagement—where one side leaves a disputed area in order to bring about the termination of a conflict or to reduce it by eliminating one of its motivating sources.<sup>123</sup>

Contemporary cases where occupying states decide to unilaterally terminate their involvement by withdrawing their forces, thereby ending their effective control, further question the contemporary relevance of the law of occupation. In the absence of a peace agreement or mutually negotiated “handover,” if the ousted legitimate sovereign does not effectively take on governance obligations, unilateral withdrawal risks leaving the local population alone to deal with the challenge of rebuilding public order and safety.<sup>124</sup> In discussing unilateral termination, observers sometimes point to two salient cases: Israel’s unilateral withdrawal from Southern Lebanon in 2000 and its unilateral withdrawal from the Gaza Strip in 2005.<sup>125</sup> Although Israel decided to end the occupation unilaterally in both of these scenarios, they unfolded quite differently, mainly with respect to a vacuum in governance, a trigger for applying any post-occupation obligations with respect to providing public order. Unlike the case of Gaza, Israel’s unilateral withdrawal from South Lebanon was coordinated with the international community, and the Security Council issued a formal resolution recognizing the end of this occupation.<sup>126</sup> In these two cases, unilateral disengagement

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166–67.

122. TOV ET AL., *THE ISRAELI-PALESTINIAN CONFLICT: FROM CONFLICT RESOLUTION TO CONFLICT MANAGEMENT* 12–18 (Yaacov Bar-Siman-Tov ed. 2007).

123. *Id.* at 16.

124. See Benvenisti, *Unilateral Termination*, *supra* note 8, at 371–82.

125. See Rostow, *supra* note 14.

126. *Id.*; See U.N. Secretary-General, *Report on the Implementation of Security Council Resolutions 425 (1978) and 426 (1978)*, U.N. Doc. S/2000/460 (May 22, 2000); Press Release, Security Council, Security Council Endorses Secretary-General’s Conclusion on Israeli Withdrawal from Lebanon as of 16 June, U.N. Press Release SC/6878 (June 18, 2000). Israel controlled only ten

failed to end the conflict but enabled its management without forces remaining on the ground.<sup>127</sup>

The law of occupation has not developed sufficiently to respond to ambiguous situations where it is not clear who has the rights and duties of governance.<sup>128</sup> Occupying forces may leave, yet sometimes the local government of the occupied territory or the returning sovereign cannot independently perform all the activities required to ensure safety and public order for the local population. Although there are situations in which international organizations step in to play this role—in transformative occupations, for example—this is not always the case.<sup>129</sup> It might be said, however, that the problem is not that the law of occupation is inadequate to the task; it is rather that its rules quite *deliberately* privilege the principle of temporality for protecting sovereignty over the civilian protection principle in this circumstance.<sup>130</sup> Faced with the possibility of a failure of governance for civilians, or creating rules that might be seen to justify the continued presence of Nazi Germany's troops in an Eastern European country during World War II, one could point out that the rules comprehend the dilemma and make a deliberate choice (hence this bias is a “feature,” not a “bug”). Yet in contemporary times, over half a century beyond the drafting of the 1949 Fourth Geneva Convention, these inadequacies have created complexities on the ground where the duties and obligations of the various international actors are insufficiently identified.<sup>131</sup>

This legal gap is, in fact, a source of significant practical dilemmas today. In the case of Gaza, for instance, there have been serious electricity shortages.<sup>132</sup> Israel is no longer an

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percent of the Lebanese territory as security zone, which included around 150,000 citizens. The Israel Defence Forces (IDF) controlled daily life within the Southern Lebanon security zone and most of the local population was employed by Israel or by the local militia that collaborated with Israel. The level of effective control that Israel exercised in Southern Lebanon was, to some extent, lower with respect to restoring “public order” without establishing a military administration. In addition, the United Nations Interim Forces in Lebanon (UNIFIL) mission had coexisted with the IDF in the territory since 1978. *Id.*

127. See Rostow, *supra* note 14.

128. See Boon, *supra* note 7, at 57; Kristen E. Boon, *The Future of the Law of Occupation*, 46 CAN. Y.B. OF INT'L LAW 107–142 (2009).

129. Kristen E. Boon, *The Future of the Law of Occupation*, 46 CAN. Y.B. OF INT'L LAW 107–142 (2009).

130. See ARAI-TAKAHASHI, *supra* note 42.

131. See BENVENISTI, *supra* note 2, at 9, 203.

132. See ANDREA BIANCHI & YASMIN NAQVI, INTERNATIONAL

occupying power in Gaza and, as a result, does not carry ongoing obligations for its population's public order and safety (apart from obligations imposed by Israeli High Court decisions for required humanitarian needs).<sup>133</sup> The Palestinian Authority exerted de-facto control over the territory beginning in 1993.<sup>134</sup> Since 2007, it no longer controls the territory and its replacement, Hamas, has hijacked the infrastructure for its own purposes.<sup>135</sup> Hamas is engaged in an ongoing armed conflict against Israel and prefers to employ its electricity to manufacture rockets instead of distributing it to the local population.<sup>136</sup> Additionally, in retaliation for ongoing attacks against its citizens, Israel has attacked Gaza's electric infrastructure and reduced its power supply.<sup>137</sup> Although Gaza

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HUMANITARIAN LAW AND TERRORISM 90 (2011).

133. *Id.*

134. See HCJ 9132/07 Gaber Al-Bassiouni v. Prime Minister, ¶¶ 12–15 (2008) (Isr.) (unpublished), [http://elyon1.court.gov.il/files\\_eng/07/320/091320.n25.htm](http://elyon1.court.gov.il/files_eng/07/320/091320.n25.htm).

135. See generally Charlesworth, *supra* note 117 (assuming that the occupation administration left little mark on the local governmental structure or the provision of basic services because the Palestinian Authority was exercising effective control since 1993 according to the terms agreed in the Oslo Accords).

136. *Id.*

137. *Id.*; *Gaza's Only Power Plant Destroyed in Israel's Most Intense Air Strike Yet*, THE GUARDIAN (July 30, 2014), <https://www.theguardian.com/world/2014/jul/29/gaza-power-plant-destroyed-israeli-airstrike-100-palestinians-dead>; Avi Bell, *Israel May Stop Supplying Water and Electricity to Gaza, A Legal Opinion*, KOHELET POLICY FORUM (July 2014), <http://en.kohelet.org.il/wp-content/uploads/2016/02/israel-may-stop-supplying-water-and-electricity-to-Gaza-updated.pdf>; Tomer Broude et al., *Legal Opinion: Israel's Duty to Supply Electricity and Water to Gaza*, (July 20, 2014), <http://gisha.org/UserFiles/File/publications/letters/letter-en-20-7-14.pdf>; Michael Bothe, *Preliminary Expert Opinion: Cutting off Electricity and Water Supply for the Gaza Strip Limits Under International Law* (July 18, 2014), <http://www.diakonia.se/globalassets/documents/ihl/ihl-resources-center/expert-opinions/michael-bothe-july-17.pdf> (explaining that on September 2016, Israel gave the PA autonomy over the distribution of electricity within its territories for the first time, but as is well known, the PA does not control the territory of Gaza). See Tovah Lazaroff & Adam Rasgon, *Israel Gives Palestinians Autonomy Over Electricity in Debt Pay-Back Plan*, THE JERUSALEM POST (Sept. 14, 2016), <http://www.jpost.com/Israel-News/PA-gets-autonomy-over-electricity-signs-plan-to-pay-debt-467665> (explaining that the electricity crisis worsened and restricted the population to 3-4 hours of power a day (as opposed to 8 hours). It sparked protests and unrest in the Gaza Strip, which eased after Qatar donated \$12 million to buy fuel for the Palestinian power plant); *Gaza Power Crisis Eases as Qatar Donates \$12 Million to Buy Fuel*, VOA NEWS (Jan. 16, 2017, 10:54 AM), <http://www.voanews.com/a/gaza-power-crisis-eases-as-qatar-donates-12-million-dollars-to-buy-fuel/3678171.html>.

has been essentially neglected with regard to governance for many years, political considerations appear to have prevented the parties involved and the international community from recognizing that formal occupation ended in Gaza when Israel withdrew its forces.<sup>138</sup> Governance responsibilities correspondingly have reverted back to the *status quo ante*. If one accepts the legal analysis that military presence is a necessity for establishing occupation, the legal conclusion is sound. The consequence, however, is territory that lacks essential services for the local population.

This deep tension between the principles, temporality and civilian protection, while evident in such contemporary occupations as Israel and Gaza, is far less visible in recent transformative occupations where the international community has taken on a role beyond the occupier and returning sovereign. In these situations, authoritative international bodies, such as the U.N. Security Council are able to bridge the gap, at least as a legal matter, between the actions of the former occupier and the actions of the “legitimate sovereign.”<sup>139</sup> But in situations that lack this kind of legitimacy and international authority, there is a distinct possibility that under the law of occupation, there is no viable legal framework for concluding an occupation in ways that fully ensure the protection of the civilian population.<sup>140</sup> The flawed assumption of the law of belligerent occupation, creating its significant weakness, is that there will always be a returning

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138. See generally TOV ET AL., *supra* note 122 (regarding the last events of armed conflict between Hamas and Israel have strongly established that it is inconceivable that Israel would be able to retain control over Gaza or that the local population would agree to such a scenario). Israel is unable to exist with military forces in the territory without being involved in bloody battles. Furthermore, Hamas would not allow Israel to maintain even the slightest presence in its territory. Israel has had no effective governmental control since the period when the PA controlled Gaza. A significant difference during that period was that there was both an Israeli military presence and Israeli settlements in the territory. Today, with no military presence and effective self-governmental control over the area, the argument that Israel continues to occupy Gaza is very weak. *Id.*

139. See 1907 Hague Regulations, *supra* note 10, arts. 53–54.

140. Martti Koskenniemi, *Occupation and Sovereignty – Still a Useful Distinction?*, in LAW AT WAR: THE LAW AS IT WAS AND THE LAW AS IT SHOULD BE 163–64 (Ola Engdahl & Pål Wrange eds., 2008); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551 (2005); Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985); Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT’L L. 1 (2006); BENVENISTI, *supra* note 2, at 1–19; BIANCHI & NAQVI, *supra* note 132; Boon, *supra* note 7, at 58; Roberts, *supra* note 14, at 27.

sovereign to prevent a lengthy vacuum of authority.

#### IV. THE EXISTING LAW OF BELLIGERENT OCCUPATION DOES NOT CREATE POST- OCCUPATION OBLIGATIONS

Ending contemporary conflicts ill-suited to the legal paradigm of the law of occupation can jeopardize the safety of the civilian population, prompting inquiry into whether the law of belligerent occupation imposes continuing duties on a former occupier. Although the binary model works to carry out the temporality principle, we have ample evidence as to how it could be less effective with respect to the civilian protection principle of the law.<sup>141</sup>

The reality of situations like Gaza and Iraq, two prominent cases where the law of occupation was applied, has ignited the need to look for legal principles tailored for a transitional stage in many contemporary conflicts. Both cases have left open questions regarding “effective control” and the factual basis for the end of occupation, along with the post-occupation obligations of the former occupying states to ensure that territory is not left ungoverned in the aftermath.

##### A. LEGAL FRAMEWORK OF POST-OCCUPATION DUTIES WITHIN THE LAW OF BELLIGERENT OCCUPATION

Since the post-World War II era, scholarship on issues of post-occupation has focused on the effectiveness of decisions made by the occupying state during the period of its control. Consistent with the law of occupation, the focus centers on the extent the new local government is bound by those decisions after the end of occupation.<sup>142</sup> Although it is a general rule that occupation laws no longer necessarily apply upon the termination of occupation, the text of the law of occupation does not address itself to the specifics of legal norms that should govern the occupying state’s obligations in the period leading up to and during the end of occupation and its relations to the returning sovereign.<sup>143</sup> The temporality principle for protecting

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141. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 125 (July 9).

142. BENVENISTI, *supra* note 2, at 18; Roberts, *supra* note 22, § 44, at 8.

143. ARAI-TAKAHASHI, *supra* note 42, at 25; Benvenisti, *Unilateral*

the sovereignty of the occupied territory, already much discussed, remains a general policy concern that is central to the fundamental principles of the law.<sup>144</sup>

As such, the law of belligerent occupation traditionally does not take into account the implications for the occupying state at the end of occupation; its obligations end and the legal effects of its acts are for the local population and the returning sovereign to assess, then maintain or reject. During the first decades following World War II, discussions amongst scholars and tribunals regarding the implications of the end of occupation largely overlooked any presumed ongoing duties the occupier might have post-occupation.<sup>145</sup> It is safe to say that the assumption of these discussions was that occupier's obligations terminated with the end of occupation or, at most, by reference to a transfer of authority agreement. Post-occupation obligations in both the Hague law and Geneva law merely consist of transitional duties. Neither supplies *positive* duties that require the occupying state to continue to exercise administrative control beyond a *limited transition period* that, as noted earlier, is formally agreed to by the parties.

The absence of continuing duties is significant. For example, Articles 53 and 54 of the 1907 Hague Regulations provide that certain items seized or destroyed by the occupant must "be restored and compensation fixed when peace is made."<sup>146</sup> The third paragraph of Article 6 of the Fourth Geneva Convention (hereafter "Article 6(3)") applies some duties to the occupying state and refers to cases of post-hostilities occupation, which is still belligerent occupation but only addresses the transitional period pending the conclusion of a peace treaty.<sup>147</sup> These

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*Termination*, *supra* note 7, at 371-82.

144. Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 575 (2005). The occupying state holds the territory in trusteeship and is allowed to take temporary measures to restore public order and safety, and to ensure its military necessities eligible by the law. The assumption of the law is that any temporary measure carried out by the occupying state does not survive unless the local population (or, alternatively, the returning sovereign) so wishes. Under these assumptions, the status quo should be kept until the end of occupation. *Id.*

145. See, e.g., SCHWARZENBERGER, *supra* note 20, at 347.

146. 1907 Hague Regulations, *supra* note 10, arts. 53-54.

147. Fourth Geneva Convention, *supra* note 27, art. 6(3) ("In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such



provisions are striking because they either relate to compensation for wrongs committed during the occupation period, or else concern a specific transitional period as agreed among the parties.

Article 6(3) of the Fourth Geneva Convention does provide that as long as the occupation is in progress and the occupying state still exercises governmental functions, the Convention's provisions remain operative.<sup>148</sup> Interpreting this Article, however, the ICJ pointed out that a distinction is made "between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation."<sup>149</sup> As a result, the ICJ said with regard to Israel that "[s]ince the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those articles of the Fourth Geneva Convention referred to in Article 6(3) remain applicable in that occupied territory."<sup>150</sup> This would seem to support the idea that the end of occupation is the winding down and termination of the occupier's legal duties, save for the process of transition.<sup>151</sup>

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Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."); DINSTEIN, *supra* note 226, at 281.

148. Fourth Geneva Convention, *supra* note 27, art. 6(3).

149. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 16, ¶ 125 (July 9).

150. *Id.*

151. It should be noted, however, that some scholars found the ICJ's interpretation of Article 6(3) to be incorrect. For example, Dinstein argues that the ICJ's Advisory Opinion on the *Wall* case is confusing, since it suggests that the one-year clock started ticking as soon as the Israeli occupation began back in 1967, arguably a premature point in time after which several surges of hostilities took place in Gaza and the West Bank. DINSTEIN, *supra* note 26, at 282–83. He suggests that Article 6(3) is analogous to an accordion, which may be compressed one year after the general close of military operations and stretched out if hostilities resume, and so on. This was not the interpretation the ICJ gave to Article 6(3), and though it might be a plausible construction/reading of the Article, it is not the most obvious one. *Id.* The one-year stipulation was later abrogated by Article 3(b) of AP1, though not the general idea that, consonant with the temporary nature of occupation, transitional periods even under AP1 cannot remain indefinite when the returning sovereign is unwilling or unable to take on its rights and obligations of governance. AP1, *supra* note 27, art. 3(b) ("[T]he application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release,

In any event, Article 6(3) stipulates that the law of occupation is invoked to preserve the obligation of a state for the duration of occupation as long as it still exercises some governmental functions without the consent of the local population in the territory.<sup>152</sup>

The Fourth Geneva Convention's text regarding these obligations remains conceptually limited by reference to the temporality principle. It is practically limited by the fact that it contemplates a transition—a transfer from one party to another. The period is not a permanent condition, and interpretations of the law of occupation building on Article 6(3) must take this into account. The text was originally conceived to address a narrow transition regime limited in scope and time, and intended to balance both fundamental legal principles of the law of occupation, much discussed in this paper, as they appeared to the drafters of the Fourth Geneva Convention at the end of World War II: (1) ensuring civilian humanitarian protection and essential governance needs for security, order, and essential services; and (2) enforcing the temporary nature of an occupation to prevent creeping annexation.<sup>153</sup>

The most accurate reading of the law of occupation, then, is that it does not itself provide or trigger anything other than a narrowly transitional regime of post-occupation obligations intended to transfer the rights and duties of governance over the occupied zone and its population to the returning sovereign. There is no positive rule or norm of post-occupation obligations in the sense of a continuing obligation to provide for the local population's needs for public order and safety once the occupier has physically withdrawn.

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repatriation or re-establishment.” (emphasis added)); Rubin, *supra* note 25, at 553–54.

152. See Ronen, *supra* note 7.

153. PICTET COMMENTARY GC IV, *supra* note 19, at 58–64. Article 3(b) of AP1 does not change this fundamental conceptual point, even as it annuls the one-year rule of the Fourth Geneva Convention and extends its application to all protected persons until their final release, repatriation, or re-establishment—that is to say, even after the general close of military operations or the termination of occupation. ARAI-TAKAHASHI, *supra* note 42, at 1, 17. Article 3(b) aims to safeguard a civilian's human rights until that individual's protection is secured, even long after the end of occupation of the territory, but it does not in itself trigger positive post-occupation obligations to ensure public order and safety for the local population based on the limited transitional regime of the law of occupation. AP1 Article 3 does not prevent legal gaps that would leave the civilian population at risk through a lack of governance; it is strictly a protective measure for individuals, not the creation of a general regime of post-occupation obligations.

Whatever the precise contours of the transition provisions of the law of occupation, they are no longer transitional if they turn out to be functionally permanent in practice. This is so whether one refers to duties toward the civilian population or rights over it. The law of occupation, as it developed over time, did not contemplate long-term occupations like Turkey in Northern Cyprus and Israel in Gaza, much less the kind of “transformative occupations” of today, such as Iraq and Afghanistan. Yet, as the International Committee of the Red Cross (ICRC) has always emphasized, IHL is sufficiently robust and flexible to adapt to changing circumstances without needing to adopt new legal prescriptions.<sup>154</sup>

#### B. STATE PRACTICE IN THE PERFORMANCE OF POST-OCCUPATION DUTIES

In the actual practice of states, there is little support for the theory of post-occupation responsibility. Although not a consequence of occupation *per se*, cases such as Kosovo and East Timor have featured international administration of territories that, in practice, constituted an international mandate to rebuild the political, social, and economic institutions of the administered territory.<sup>155</sup> In certain key aspects, the goals of post-occupation obligations and the law of occupation are analogous: “to govern on a temporary basis, and to strike a balance between overall administrative authority of the outside power and the non-alienability of the sovereignty of the territory concerned.”<sup>156</sup> On the other hand, cases such as Kosovo and East Timor are essentially examples of international trusteeship, with a core feature that in each case the local population *welcomed* the outside international administration and forces because they saw them as protection against hostile forces outside the territory. In this regard, the contrast with genuinely belligerent occupation could not be more explicit.<sup>157</sup>

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154. See generally JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 59 (1985) (“[T]he minimum principles of humanitarian law are valid at all times, in all places and under all circumstances, applying even to states which may not be parties to the Conventions, because they express the usage of peoples.”).

155. See Roberts, *supra* note 22, ¶ 50, at 939; Dr. Emmanuel Vianès, *What is an International Post Belligerent Administration?*, 25 IND. INT’L & COMP. L. REV. 421 (2015).

156. Roberts, *supra* note 22, ¶ 50, at 939.

157. See ERIC D. PATTERSON, ENDING WARS WELL: ORDER, JUSTICE, AND

U.N. Security Council Resolution 1483 regarding the end of United States-led powers in Iraq provided its own tools to ensure the occupying state's accountability to and respect for the law.<sup>158</sup> Its approach differs from the situations described above, because the United States acknowledged that it was, for a time, an occupier under occupation law.<sup>159</sup> In so doing, the resolution set an example for future occupations and could fill a serious gap in the law of belligerent occupation, possibly ensuring that territory is not left ungoverned during transitional periods. It does not alter the law of occupation as such, but instead supplements it with an exogenous legal authority via the Security Council.

U.N. Security Council Resolution 1483 might be offered to support the argument that, in some contemporary occupations, the occupying state is subject to additional duties toward the occupied population.<sup>160</sup> The difficulty here is that the very existence of a Security Council resolution makes it unclear whether these duties conferred on United States-led forces as the occupier arise from the law of belligerent occupation or from the Security Council's special legal authority.<sup>161</sup>

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CONCILIATION IN CONTEMPORARY POST-CONFLICT 168 (2012).

158. See S.C. Res. 1483, art. 9 (May 22, 2003). Security Council Resolution 1483 supported the formation of an Iraqi interim administration, a transitional administration run by Iraqis, which would govern until an internationally recognized, representative government was established by the people of Iraq to assume the former responsibilities of the occupying states. It also facilitated the appointment of a special U.N. representative for Iraq whose independent responsibilities involved reporting regularly to the Council on his activities under the resolution, coordinating activities of the U.N. in post-conflict processes in Iraq, and among U.N. and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq. In coordination with the occupying states, the U.N. representative was also tasked with assisting the people of Iraq in multiple areas, including restoring and establishing national and local institutions for representative governance, facilitating the reconstruction of key infrastructure, promoting economic reconstruction and the conditions for sustainable development, encouraging international efforts to contribute to basic civilian administration functions, promoting the protection of human rights, encouraging international efforts to rebuild the capacity of the Iraqi civilian police force and encouraging international efforts to promote legal and judicial reform. The Security Council resolution further established a Development Fund for Iraq to address the humanitarian needs of the Iraqi people for the economic reconstruction and repair of Iraq's infrastructure, the country's continued disarmament, the costs of an Iraqi civilian administration, and other purposes benefiting the people of Iraq. See *id.*

159. *Id.*

160. BENVENISTI, *supra* note 2, at 270.

161. *Id.*

There was also concern in the Iraq case that the Security Council had overreached its jurisdiction, setting up a scenario where the law of occupation could not support all that it might be called upon to do.<sup>162</sup> The transition to democracy represented a radical departure from the traditional conservationist principles underlying the law of belligerent occupation.<sup>163</sup>

The broad mandate granted to the occupying powers in Iraq during the occupation (and long after its termination) tested the law of occupation's limits.<sup>164</sup> This action only became permissible as a result of the local population's desperate economic and political situation, the full accountability of the occupying states with the Security Council, the Security Council's ratification, and the fact that the occupiers clearly lacked any territorial aspirations toward Iraq.<sup>165</sup> This scenario was largely enabled because the occupying state remained present with its military troops within the territory of the newly re-enshrined sovereign, the new Iraqi government, which gave its consent for the former occupier to conduct basic security missions and carry on these obligations.<sup>166</sup> Had United States-led forces not been physically present in the territory, such tasks likely would have been impossible to carry out—irrespective of whether there was a claim of a post-occupation legal obligation to maintain public security and order. Thus, it would be difficult to draw the legal conclusion that occupation carries post-occupation obligations on the former occupier from the sparse incidence of state practice with respect to acknowledged occupation.

C. SCHOLARLY VIEWS ON THE EXISTENCE (OR NOT) OF POST  
OCCUPATION OBLIGATIONS UNDER THE LAW OF  
BELLIGERENT OCCUPATION

Some scholars who support the argument that the law of occupation creates post-occupation obligations claim that legal norms for these obligations logically derive from the law of belligerent occupation itself.<sup>167</sup> Cassese, for example, argues that the body of the law of occupation should be interpreted in a

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162. *See id.* at 268.

163. *Id.* at 269.

164. *See* Robert, *supra* note 2, ¶ 48, at 938.

165. *See* BENVENISTI, *supra* note 2, at 264–75.

166. *Id.*

167. *See, e.g.,* Eyal Benvenisti, *Applicability of the Law of Occupation*, 99 AM. SOC'Y INT'L L. PROC. 29 (2005).

“flexible” way with a process of “adjustment” to the new context in which contemporary conflicts operate, while maintaining its original objectives and principles.<sup>168</sup> Consequently, in his view, the Hague Regulations should be interpreted in light of developments in international law and the factual developments that have occurred since its drafting in 1907, with a particular eye to cases of prolonged occupation.<sup>169</sup>

In Roberts’ view, since determining the precise moment occupation ends may hold less significance, the current priority is applying the law in a wide variety of situations, even occasionally where no occupation has been declared to exist, or in cases where occupation has been pronounced terminated.<sup>170</sup>

Benvenisti suggests that the obligations of occupying states under the law of occupation should be interpreted as also entailing obligations to ensure ongoing public order and civil life as much as possible, not only during the occupation, but also immediately after its end and during the transition of authority to the sovereign local government.<sup>171</sup> Therefore, Benvenisti stresses that the nineteenth-century conception based on Article 43 of the 1907 Hague Regulations should be interpreted without its traditional constraints and instead with contemporary perceptions of the broad authority post-conflict societies require for preventing chaos and restoring public order.<sup>172</sup>

Rubin suggests that restricting the ability of the occupying state to withdraw from the occupied territory before reaching resolution of all territorial issues is against existing legal principle.<sup>173</sup> He also holds that extending the state of occupation beyond the actual period of occupation negates the principle that occupation should reflect facts on the ground.<sup>174</sup> Additionally he suggests a better approach would be to enable the occupying state to end its presence in the occupied territory without terminating its responsibilities toward it.<sup>175</sup> Once the occupying state is no longer in effective control of the territory, the trigger to apply post-occupation obligations in the scope of the law of occupation should derive from either the consent or request of

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168. CASSESE, *supra* note 121, at 255.

169. *Id.*

170. Roberts, *supra* note 22, § 57, at 10.

171. Benvenisti, *Unilateral Termination*, *supra* note 7, at 371–82.

172. Benvenisti, *supra* note 167, at 30–31.

173. Rubin, *supra* note 25, at 549–50.

174. *Id.*

175. *Id.*

the local government or a decision of the international community.<sup>176</sup>

This canvassing of different scholarly views on the question of post-occupation obligations points to a general dissatisfaction with what is, in fact, the law of occupation as legal text: a strict binary. It makes excellent sense, as these eminent scholars say, that foreign occupying forces are permitted to remain and support the transition in a transformative occupation, such as Iraq. This type of movement—from “occupier” to “invited guest”—permits flexibility in the obligations and powers of an occupier/invited guest during the transition; however, scholars generally note that in such cases, the occupation is actually no longer belligerent but in a different process—for example, a legal or constructive international trusteeship.

Still other commentators insist that the law of occupation addresses belligerent occupation. Accordingly, transformative occupations and similar processes should apply the appropriate bodies of law after the occupation, such as deferring to the special authorities of the Security Council.<sup>177</sup> The law of occupation provides the occupying power with coercive measures for installing its authority.<sup>178</sup> It is therefore problematic to argue that these measures should extend after the end of occupation, when it is impossible to assign the ousted local government any measures of governance without legitimacy and consent granted by the returning sovereign. For that matter, some commentators note that the law of occupation applies only to define contemporary war-to-peace transitions of international character where the occupier must be exercising effective control while physically present in the occupied territory, and the actors involved must be contracting parties to the Geneva Conventions for its application.<sup>179</sup> If these are the terms, it is impossible to

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176. *Id.* at 552–53.

177. *Id.* at 551.

178. Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 595 (2006).

179. Kristen E. Boon, *The Future of the Law of Occupation*, 46 CAN. Y.B. OF INT'L LAW, 107, 110–14 (2009); Fourth Geneva Convention, *supra* note 27, art. 2 (“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in

draw post-occupation obligations from the law of occupation after occupation terminates.

It is hard to argue with this admittedly hardline reaction against turning the law of occupation into an exceedingly flexible body of law for foreign forces on another sovereign's territory. The more open approach compromises, after all, the fundamental principle of the law of occupation—the temporality principle. It also engages a level of wishful thinking regarding the many obligations this would impose on the international community. Perhaps the best conclusion to draw from these unsettled, cross-cutting positions adopted by commentators and scholars is that the law of belligerent occupation does not create a regime of ongoing post-occupation obligations beyond its textual transition regime. Above all, in my view, the law of belligerent occupation must be preserved distinctly for its unique function: *belligerent* occupation.

There are many possibilities that might trouble both a former occupier and a newly restored sovereign with respect to ongoing obligations claimed to derive from the law of occupation after the occupation ends. These possibilities bear noting as a caution against excessive enthusiasm for finding ways to establish such obligations. One way to understand the cautions against excessively embracing post-occupation duties grounded in the law of occupation is to ask why, if this approach is so obvious and promising, the formal law of occupation has not *already* evolved toward formal acceptance of a regime of post-occupation law. The answer takes us back to the temporality principle.<sup>180</sup> Despite its honorable origin in a desire to render illegal the annexation of territory through occupation that was a feature of World War II, this principle seemed somehow quaint after the end of the Cold War and the celebration of the decline of sovereignty. Such a perspective seems less desirable today, as many international actors look, for example, to Russia's behavior in Crimea, and suddenly discover a new enthusiasm for embracing it.<sup>181</sup> A deliberate blurring of the lines between occupation and invitation no longer seems quite as desirable, at least not without Security Council authority or protection. As mentioned, Turkey's activities in Northern Cyprus offer another

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their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”).

180. See Ben-Naftali et al., *supra* note 140, at 592.

181. See Benvenisti, *supra* note 8, at 16, 17.



relevant example.<sup>182</sup> One conclusion that could be drawn by sovereigns whose territory is under full or partial occupation, whether formally acknowledged by the occupier or not, is that they indeed want a clear line between occupation and non-occupation. This line is desirable because they legitimately fear the consequences to their security and territorial integrity without it.

Although post-occupation obligations derive from situations of occupation, it does not follow that the status of occupation or the law of occupation continues to apply after the elements of occupation have been removed. As Benvenisti implies, in order for genuine standards of post-occupation obligations to emerge and be adopted by occupying powers, they should be governed by principles of focus and limitation.<sup>183</sup> Applying the law of occupation in the post-occupation phase, with all of its obligations specific to the physical presence of the occupier, ignores occupation law's fundamental basis of effective control, which is largely removed at the stage of post-occupation.<sup>184</sup>

Moving in this direction, would give few incentives to the occupying state to end an occupation and allow the local sovereign government to establish stable administration over the territory. Removing the law of occupation from its original role of temporarily restoring and maintaining public order in an occupied territory and installing it as a law for rebuilding indigenous local government with legitimate authority and governance capacity is a perilous enterprise.

Although under some circumstances it might even be politically desirable within the international community for an occupier to continue its occupation as long as the sovereign of that territory is unprepared or unable to take effective control, there is no legal obligation on the occupier to maintain its occupation; an occupier is always legally free to withdraw. For that matter, we should not neglect the possibility that an occupier will be militarily *forced* to withdraw in the setting of an ongoing armed conflict, even though this action could leave the territory ungoverned.

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182. See *supra* notes 62–64.

183. Benvenisti, *Unilateral Termination*, *supra* note 7.

184. Roberts, *supra* note 22, § 48, at 8.

V. TRANSITIONAL POST-OCCUPATION OBLIGATIONS  
ARISING UNDER AN EXPANSIVE READING OF  
THE LAW OF BELLIGERENT OCCUPATION

The legal conclusions produced by the law of belligerent occupation leave a significant, unsatisfying gap between the doctrinal law as it stands today, and current situations of occupation and its aftermath. It is not just that the legal conclusions are simply outdated or anachronistic. On the contrary, the legal conclusions that occupation ends upon the physical withdrawal of forces from the territory, thereby extinguishing the legal duties tied to it, have an important justification in the fundamental motivations underlying the law of belligerent occupation—the temporality principle. The “binary” position—that occupation and the ensuing rights and duties for an occupier are either “on” or “off”—is not just an accurate description of the law, it also lays down a clear, bright line that distinguishes when an occupier is entitled to exercise authority in a foreign territory and when it is not.<sup>185</sup> As we have seen, the difficulty with this approach is that the binary does not suit how foreign forces begin and end their occupations of another’s territory and address its population in the diverse situations of occupation so prevalent today.

The law of belligerent occupation does not create ongoing post-occupation duties, and the failure of civilian protection is simply the tradeoff for ensuring that a former occupier actually gives up its prerogatives. Rather, it seems that the law of belligerent occupation does offer certain possibilities for addressing this problem of civilian protection through an expanded understanding of its existing terms on coordinated transitions from the former occupier to returning sovereign.

A. LEGAL FRAMEWORK FOR TRANSITIONAL POST-  
OCCUPATION OBLIGATIONS UNDER THE LAW OF  
BELLIGERENT OCCUPATION

It is suggested that some form of limited transitional post-occupation obligations (as opposed to post-occupation obligations and duties on the departing occupier alone) should be triggered under certain circumstances. These include when the end of occupation is not a specific moment concluded by a peace

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185. See Ben-Naftali et al., *supra* note 140, at 592.

agreement and where the specific circumstances indicate that authority will not be fully restored with the end of occupation.<sup>186</sup> Thus, when it is known, as in the cases of Gaza, South Lebanon, and Iraq, for example, that the end of occupation is approaching and gaps in essential governance are an issue, transitional post-occupation obligations should be limited in time and scope and reached by negotiation or coordination of the international community.

The Fourth Geneva Convention refers, in Article 6(3), to the cessation of the application of the Convention a year after the general close of military operations.<sup>187</sup> It then provides that certain measures bind the occupier “for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory,” and goes on to list specific provisions of the Convention.<sup>188</sup> AP1 removes the one-year limitation by reference to the continuing safekeeping of protected persons as defined by the Convention.<sup>189</sup>

For the purpose of examining what possibilities exist of an expanded, yet disciplined, reading of the law of belligerent occupation in these and other provisions, however, we note that they point implicitly to a *transitional period* during which protected persons continue to be protected, but under which the occupier withdraws. And, as it withdraws with respect to exercising the “functions of government”—its obligations as well as its rights extinguish themselves. Although Article 6(3) does not specifically mention the returning sovereign in the context of the transfer of governance authority, it is clear that it *transfers back*, to the returning sovereign.<sup>190</sup> This is consistent with the conservationist temporality principle of the law of belligerent occupation.

The Commentary on the Fourth Geneva Convention clearly suggests that the occupier may gradually reduce its obligations and authority as the returning sovereign gradually assumes them.<sup>191</sup> Although the language of the Convention ceases to

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186. See *supra* notes 8–10.

187. See Fourth Geneva Convention, *supra* note 27, art. 6(3).

188. See *id.*

189. See AP1, *supra* note 27; PICTET, *supra* note 154.

190. Fourth Geneva Convention, *supra* note 27, art. 6(3); see also Ben-Naftali et al., *supra* note 140, at 596.

191. See PICTET COMMENTARY GC IV, *supra* note 19, at 62–66 (“In the preliminary stages it had been thought that the Convention would only cease to apply when the occupation itself was at an end. That was what the draft text adopted by the Stockholm Conference laid down. Several delegations pointed

apply one year following the close of general hostilities, the Commentary goes on to make clear that some form of occupation authorities, functions, and obligations may well last beyond a year (it references Japan and Germany) and contemplates exactly this type of sliding scale.<sup>192</sup> Yet the Commentary is referring, in this case, not to post-occupation obligations but instead to occupation obligations of an occupation that is still ongoing.<sup>193</sup>

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out at the Diplomatic Conference, however, that if the occupation were to continue for a very long time after the general cessation of hostilities, a time would doubtless come when the application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the Occupying Power *had been handed over to the authorities of the occupied territory*. In 1949 the delegates naturally had in mind the cases of Germany and Japan. It was finally laid down, therefore, that in occupied territory the Convention would be fully applicable for a period of one year, after which the Occupying Power would only be bound by it in so far as it continued to exercise governmental functions. The solution appears to be a reasonable one. One year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have some effect. Furthermore, two cases of an occupation being prolonged after the cessation of hostilities can be envisaged. When the occupied Power is victorious, the territory will obviously be freed before one year has passed; on the other hand, if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.”).

How is the end of the occupation of an occupied territory to be determined? Recent events, and present history, have shown that the conditions under which wars terminate have undergone a profound change; and that occupation involves far more than it did formerly. It therefore seems logical and judicious to provide for a minimum period during which the provisions should continue to be enforced, a period fixed at one year after the general conclusion of military operations. Should occupation continue after that date, it appears normal that the Occupying Power should *gradually hand over the various powers it exercises, and the direction of the various administrative departments, to authorities consisting of nationals of the Occupied Power. From that time on, the Occupying Power will, of course, no longer be in a position to undertake all the duties for which it was responsible as long as it continues to exercise the full prerogatives of the occupied State*. A choice should therefore be made between provisions intended to protect the population of the occupied territory while occupation continues, and those, on the contrary, which should cease to apply as soon as the justification for them, namely, the exercise of powers by the Occupying Power, has ceased to exist.

*Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, at 815 (emphasis added).

192. See PICTET COMMENTARY GC IV, *supra* note 19, at 62–66.

193. *Id.*

What could be understood to arise from this structure is the possibility of not exactly “post” occupation duties on the former occupier but instead a “transitional” regime of the occupier’s prerogatives and duties as it gradually ceases to exercise the functions of government in that territory—by reference to the “duration of the occupation” language of Article 6(3)—for as long as the occupation continues. To reiterate, the transitional period might be conceived to cover the period of time – perhaps brief, perhaps longer—that the occupation continues, and the occupier continues to exercise rights and duties of governance in the territory. By its conception, this phase is transitional and temporary, consistent with the temporality principle of the law of belligerent occupation; but it is also protective of civilians in the transition itself.<sup>194</sup>

What about the returning sovereign? The provisions of the 1907 Hague Regulations (Articles 43, 55) insist that the governance character of the occupied territory be preserved except to the extent of military necessity—and by reference to the (eventual) returning sovereign.<sup>195</sup> These provisions demonstrate the intrinsic role of the returning sovereign during transition—the sovereign’s governance rights and duties increasing as the occupier’s rights and duties diminish. It is a meaningful actor in this transfer. To be clear, I do not want to overstate the textual basis for asserting that the returning sovereign has rights and duties in relation to the “transfer back” of governance authority—Article 6 does not directly mention the returning sovereign. But, in light of the Fourth Geneva Convention’s commentary, this approach seems the best reading of the provisions of the law, seeking to conserve the governance character of the occupied zone and its population as far as possible in contemplation of the return of the ousted sovereign. If this conception holds sway as the general construction of the law of belligerent occupation, then it seems reasonable to view this interpretation as the best way to understand the transitional period during which governmental authority is transitioned back to the returning sovereign. The implication, however, is that in order to spare the civilian population a vacuum of governance, the returning sovereign takes up the rights and duties of governance in its sovereign territory as the departing occupier gives theirs.

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194. Benvenisti, *Unilateral Termination*, *supra* note 7, at 371–82.

195. 1907 Hague Regulations, *supra* note 10, art. 55.

Maximum coordination best ensures the least risk of civilians being left without protection through governance, but in many circumstances, coordination is likely to fall far short of the ideal. But, this approach diverges from other proposals for post-occupation duties in that it is not simply a set of obligations that fall upon the former occupier that lack the requirement of transition, it imposes the weight of the transfer onto the returning sovereign.<sup>196</sup>

Such an extensive reading and interpretation of the law of belligerent occupation is in line with the fundamental rule of treaty interpretation as articulated in article 31(1) of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>197</sup> Analyzing the commentary of the Fourth Geneva Convention and its original meaning, the argument for transitional post-occupation obligations rests on the following foundational pillars: (1) the object and purpose of ending occupation, described as a transition process during which governmental authorities are being transferred from the occupying power to the returning sovereign; (2) the legal principle of the law of belligerent occupation that assumes that the end of occupation is concluded by agreement or consent;<sup>198</sup> (3) the balance that the law of occupation strives to maintain between the two underlying principles of civilian protection and temporality to protect territory’s sovereignty; (4) the IHL legal principle of civilian protection, articulated in the Marten Clause, that protects civilians and belligerents, even in situations arising from armed conflict that were not anticipated by specific treaty provisions;<sup>199</sup> (5) the evolving customary obligation to negotiate in good faith in an attempt to end occupation.<sup>200</sup> From all of the above, one might reasonably argue that the current realities of occupation indeed require the departing occupying power to accept modest transitional post-occupation duties. This is a “plausible” and practical reading and interpretation of the

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196. See CASSESE, *supra* note 121, at 255.

197. Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

198. See Roberts, *supra* note 22, § 55, at 9–10.

199. See Meron, *supra* note 80, at 79 (discussing how the Martens clause is read broadly to protect and enforce international humanitarian law).

200. *E.g.*, S.C. Res. 1546, *supra* note 51 (discussing Iraq’s welcoming of United Nations support during Iraq transitioning to a democratically elected government).

law of belligerent occupation in its texts on transitions out of occupation.

B. A PROPOSAL FOR TRANSITIONAL POST-OCCUPATION  
DUTIES: POSSIBLE EFFECTS ON THE INCENTIVES AND  
DISINCENTIVES OF THE DEPARTING OCCUPIER AND THE  
RETURNING SOVEREIGN

The fact that transitional post-occupation obligations are reciprocal duties rather than ongoing one-sided obligations of the former occupier offers the first incentive for their adoption. These obligations would fall upon both parties (departing occupier and returning sovereign) in three main scenarios: (1) an occupying state unilaterally withdraws to end the occupation, yet its actions still affect the territory; (2) an occupying state's armed forces remain in the territory following the end of occupation for reasons related to operational military necessity with respect to the conflict itself, but they are not exercising the authorities of governance required for occupation; or, alternatively, the occupying state's forces leave the territory physically, but continue to undertake military operations remotely as a matter of military necessity in the unresolved conflict; or (3) a successor transitional administration takes over governance of the territory but still needs the involvement of the former occupying state, as a practical matter, for the duration of the transition.<sup>201</sup>

Accordingly, transitional post-occupation obligations would mean that the occupying state could be subject to certain transitional duties over the former occupying territory *even after the formal end of occupation*—but conceptually, only as a matter of transition and not as an ongoing unlimited one-sided obligation. While the former occupying state continues to carry post-occupation obligations, the incoming power must assume responsibilities as part of its assumption of sovereign authority.<sup>202</sup> Gradually the burden to provide for the local population shifts to the sovereign authority.<sup>203</sup> The length of this transition would be determined by facts on the ground as well as, preferably, negotiations among the parties and perhaps also with international authorities that could (in some

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201. See Roberts, *supra* note 9, at 250 (explaining three different approaches to occupation with international military involvement).

202. Benvenisti, *Unilateral Termination*, *supra* note 7, at 11.

203. *Id.* at 7–8.

circumstances) take on certain governance tasks with respect to the civilian population.<sup>204</sup>

In other words, as other scholars have suggested, occupation can be ended without the automatic extinguishing of every obligation but only during a transitional period when it is known that the occupying power's intention is to end the occupation.<sup>205</sup> Transitional post-occupation obligations should be premised on the continued concern for civil life after the end of occupation and on the specific, practical reason that such concerns exist.<sup>206</sup>

During the transitional period, the local government is obliged to restore its independent authority and either avoid developing a dependency on the former occupying state or coordinate in consenting to an ongoing dependency, if necessary, for ensuring public order and safety for the local population. Each case should be examined in light of specific circumstances to determine which transitional post-occupations apply to the parties and how best to enact the gradual process of ultimately transferring all authority to the local sovereign.<sup>207</sup>

Ideally, this process would take place simultaneously and with parallel commitments, so that the former occupying state would continue to bear responsibility for authorities that the local government could not yet perform, while at the same time it would transfer the appropriate, immediately achievable duties to the local government. The local government then *must* do whatever is necessary to cooperate with the former occupying state to build its capacity during a limited period of time to achieve its full independence. During the transitional period, much emphasis should be placed on the future destiny of independent authority in the territory, and the ongoing obligations of the former occupier should be structured to assist this aim.

Since they are reciprocal, transitional post-occupation obligations also must address the needs of the occupying state, taking into account security measures for its population during the transitional period, especially if the conflict is continuing. An

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204. See generally BENVENISTI, *supra* note 2, at 255–56 (discussing the end of the Iraq occupation effecting previously enacted Resolutions and Coalition Forces).

205. E.g., Meron, *supra* note 80, at 87–88 (explaining the modern application of the Martens clause regulating humanitarian law should conflict arise). See generally Benvenisti, *Unilateral Termination*, *supra* note 7, at 9 (stating automatic succession to former human rights treaties is strongly desired).

206. Rubin, *supra* note 25, at 553–54.

207. Ronen, *supra* note 7, at 445.



ongoing armed conflict that continues against the former occupier may have the effect of reducing the level of transitional post-occupation responsibilities applied to the latter. This could be especially true in circumstances in which post-occupation services and provisions are used as a military measure against the former occupying state by the local government and the former occupied territory.

The second incentive for the adoption of transitional post-occupation obligations is the utilization of negotiation or coordination by the international community rather than the reliance on coercive measures after the end of occupation. The terms should be negotiated or coordinated once it is known that the end of occupation is approaching—that is, in the final stages of an occupation when there is a risk that the withdrawal of the occupying state will leave the territory ungoverned. One typical indication of this kind of scenario that occurred in the cases of both Gaza and Southern Lebanon is the announcement of the intended withdrawal date of military troops, which also signified an implied loss of ensured public order and safety.<sup>208</sup>

Occasionally, political rather than legal considerations might prevent the parties or the international community from recognizing the end of occupation in order to prevent the release of the occupying state from its obligations. That outcome, however, is inconsistent with core principles of the law of belligerent occupation, and adopting transitional post-occupation obligations on both the former occupying state and the returning sovereign could offer a solution. When the end of occupation is both within reach and yet not assured, voluntarily assumed, transitional post-occupation obligations should be used as a means to clarify responsibilities while assuring that the territory is not left ungoverned or in a highly unstable state. When transitional post-occupation obligations are required where the conflict continues, or where the conflict is ended but the former adversaries are far from friends and negotiation seems impossible, it is the role of the international community to step in for the coordination of transitional post-occupation obligations for both sides. This must occur while recognizing that occupation has ended, setting the conditions for the transition period, without which the occupying power would not be released from its obligations and the returning sovereign would formally hold responsibility for the territory, whether or not it was

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208. *E.g.*, Rubin, *supra* note 25, at 558 (stating public order is an inadequate in the Gaza Strip after and before disengagement).

prepared to do so.<sup>209</sup>

The international community's coordination is vital here in order to maintain effective control after occupation has ended and until the returning sovereign is able to restore its authority. It should also be noted that exercising effective control after the end of occupation requires the legitimacy and consent of the local government in the former occupied territory.<sup>210</sup> The interpretation of the Fourth Geneva Convention implies reciprocal post-occupation duties for a transitional period only, but in order to apply them, the former occupier must have legitimacy.<sup>211</sup>

Realizing "legitimacy" in the context of transitional post-occupation obligations may be difficult. Politically, the feelings of the local population might be so strained that even if the society accepts transitional post-occupation obligations, the reality would only allow the acceptance of funds for compensation but nothing beyond that. Legitimacy for the application of transitional post-occupation obligations that entail the ongoing exercise of effective control can be realized when no tensions between the former occupying power's interest in maintaining its security and the local population's interest in maintaining its security and welfare exist—typically, this occurs when the government of the territory has consented to the involvement of the former occupying power. Such consent must not have been obtained under duress and must be expressed by an authority that is empowered to bind the government concerned.<sup>212</sup>

The third incentive for the adoption of transitional post-occupation obligations is that they are temporary, transitional measures, utilized only until the returning or new local regime has developed independent authority to ensure public order and

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209. See U.N. Doc. S/2000/460, *supra* note 126 (explaining Israel and Lebanese military relations).

210. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 380–82 (1983). "Legitimacy" of a social order is the effective belief in its binding or obligatory quality." *Id.* at 380. "It is a state of widespread belief; namely, the belief that an order is obligatory or exemplary. Moreover, the belief is a reason for action." *Id.* at 382. "[I]n general, the greater the legitimacy, i.e., the greater the observed belief in the obligatory qualities of an order, the greater the conformity to the norms believed legitimate." *Id.* Ferraro, *supra* note 15, at 152, 153.

211. See Fourth Geneva Convention, *supra* note 27, arts. 2–3.

212. See generally Zwanenburg, *supra* note 16, at 37–41 (discussing occupation with prior or existing military conflict).

safety for the local population; they are not ongoing obligations for an unknown period of time.<sup>213</sup> The main challenge is to determine when the returning or new local government has indeed developed its own capability of independence.<sup>214</sup> Such a determination should also consider when the new or returning local government *should have reasonably* developed independence, not just when the local government has *actually* gained independence.<sup>215</sup> In some cases, all means have been provided for the local government to exercise its own administrative authority, and yet these resources are misappropriated. Common examples include corruption of the new regime or its funding of militant activities. In such cases, the local government might find it convenient that the former occupying state has ongoing responsibilities instead of addressing these issues itself.

A good reference point to assess the ability of the local government to exercise effective control may be the pre-occupation condition of the former occupied territory, although that assessment can be misleading in cases of prolonged occupation or when the right of self-determination is fulfilled for the first time.<sup>216</sup> The danger lies in imposing the costs, in effect, of a newly returned or newly established local administration's corruption or incompetence, potentially in perpetuity, on the former occupier, which will dissuade it from fulfilling its own obligations.

The length of time that transitional post-occupation obligations should apply, then, would depend on the specific local conditions, and the obligations should end when the local government is in a position to govern, or when the humanitarian needs of the local population are no longer attributable to the end of occupation but instead to the local government.<sup>217</sup> As discussed, great emphasis should be placed on not allowing bad governance to be rewarded by externalizing those costs onto the former occupier. Transitional post-occupation obligations should therefore come with incentives as part of the framework for the local government to ensure the establishment and rebuilding of all that is required to effectively self-govern and restore public

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213. Benvenisti, *Unilateral Termination*, *supra* note 7, at 371, 381; Rubin, *supra* note 25, at 553–54.

214. Ronen, *supra* note 7, at 432.

215. Rubin, *supra* note 25, at 553–54.

216. Ronen, *supra* note 7, at 432.

217. Rubin, *supra* note 25, at 553–54.

order and safety.

The level of dependency of the local population on the services and infrastructure provided by the former occupier state during occupation could be a critical practical factor for devising and negotiating the duration of transitional post-occupation obligations. Whether a local population's dependency on the occupying state resulted from the period of occupation is a consideration, and territorial contiguity might impact the scope and extent of such obligations, as dependency is more likely when the occupying state is merely across the border.<sup>218</sup> If the local population is not economically dependent upon the occupying state, then perhaps transitional post-occupation obligations are not necessary, apart from the transition regime already contemplated in the law of belligerent occupation.<sup>219</sup> If there is only financial dependency, then post-occupation obligations may be different from and more limited than those required after the end of the occupation in cases where the economy is actually intertwined with that of the occupying state.<sup>220</sup> Clearly, historical sensitivity and contextual awareness will always be crucial in the construction of any transitional post occupation obligations.

## VI. CONCLUSION

The law of belligerent occupation does not create one-sided post-occupation obligations in itself because it is concerned not only with civilian protection, but also with ensuring that occupation should be a temporary condition. It contemplates the return of the legitimate sovereign and ensures that occupation (or post-occupation duties) do not become a mechanism for creeping annexation and *de facto* conquest of territory. Yet with regard to contemporary conflicts, which do not always fit the legal binary paradigm of ending occupation, this law leaves the possibility that in satisfying the conditions of the second principle, temporality and return of the legitimate sovereign, a serious gap may exist with regard to the first principle, civilian

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218. Ronen, *supra* note 7, at 434 (explaining dependency is not necessarily a result of the occupying state's wrongdoing; it can also be a consequence of conforming to the law of belligerent occupation requirements).

219. See Ronen, *supra* note 7, at 435 (discussing occupant obligations under Article 43 of the Hague Regulations).

220. *E.g., id.* at 433 (referencing the economic dependence of Northern Cyprus on Turkey).

protection. To fill the vacuum, the law of belligerent occupation could be interpreted, based on Article 6(3) of the Fourth Geneva Convention, to better accommodate contemporary situations of occupation.

It is suggested that some form of limited transitional post-occupation obligations should be triggered under certain circumstances—among others, when the end of occupation is not a specific moment concluded by a peace agreement and where the specific circumstances indicate that authority will not be fully restored with the end of occupation. Thus, when it is known that *the end of occupation is approaching* and gaps in essential governance are an issue, transitional post-occupation obligations should be limited in time and scope and reached by negotiation or coordination of the international community.

The interpretation of Article 6(3) of the Fourth Geneva Convention for transitional post-occupation obligations suggests that the law of belligerent occupation contains more possibilities on its own terms than may have previously been thought—and that in important respects, such an approach extends toward resolving some of the tensions among the fundamental purposes underlying the law, minimizing the risk that territory would be left ungoverned. It also achieves some effect in addressing the issues of incentives and disincentives regarding the departing occupier and returning sovereign.

The approach locating transitional post-occupation obligations under the law of belligerent occupation with respect to today's conflicts and occupations (whether acknowledged by the occupier or not), cautions against creating post-occupation obligations solely for the former occupier. To foster an effective transition between occupation and post-occupation the returning sovereign should assume some obligations as well. The "transitional post-occupation duties" then, are an attempt to coordinate the transfer of obligations from occupation to post-occupation—from occupier to returning sovereign—in a manner that fulfills the civilian humanitarian protection requirements, even if a formal end to occupation has not been achieved yet.

The weight of international legal norms regarding the local population's protection, together with respect for sovereignty, means that the parties have an obligation to negotiate with each other in good faith, as the circumstances of the conflict permit, in order to achieve a coordinated satisfaction of humanitarian protection for the affected civilian population while ensuring fulfillment of the territory's sovereignty. Beyond that, any terms

more specific than the general motivations of the law of belligerent occupation seem able to be satisfied by negotiations between the parties, and, if needed, with the encouragement and coordination of international authorities in ways that reflect the realities of any particular conflict and occupation.

Applying transitional post-occupation obligations in the suggested manner maintains the temporary nature of occupation, encouraging occupying states to end occupation without the risk of unlimited ongoing obligations, even as it requires that they shed an occupier's rights. Although it cannot motivate sovereigns essentially uninterested in civilian protection, either the departing occupier or the returning sovereign, this approach can at least indicate to them that their obligations are reciprocal. The requirement of a "handing-over" of obligations is a sliding scale process, limited in time and scope, until responsibility for governance is fully restored and the local population is at least potentially protected. For the occupying power, it diminishes the worry that it would remain responsible for the local population as long as the local sovereign failed to fully exercise governmental authority, no matter the reason and duration. For the local government, it diminishes the worry that an occupying state would use post-occupation duties as an excuse for continuing its control over the territory, eventually raising the risk of annexation in the name of civilian protection.

The uneasy fit between many contemporary conflicts and the paradigm of ending occupation according to international law is an immediate problem that renders local populations dangerously vulnerable, and will continue to do so. Therefore, the need for a measured and practical approach, such as transitional post-occupation obligations that can address occupations in the current context, is essential.